Petition

Supreme Court, U.S.
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81-1794

In the

Supreme Court of the United States

October Term, 1981

UNITED STATES OF AMERICA *ex rel.*
DAVID BARNES,

Respondent,

—against—

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,

Petitioners.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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Questions Presented

Whether, on appeal from a criminal conviction, the Sixth and Fourteenth Amendments to the United States Constitution require assigned defense counsel to raise every nonfrivolous issue requested by defendant.

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Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit is reported at 665 F.2d 427 (2d Cir. 1981).

Jurisdiction

The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Sixth and Fourteenth Amendments to the Constitution of the United States provide respectively, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Statement of Facts

State Court Proceedings

On March 15, 1976, David Barnes, hereinafter referred to as respondent, and three accomplices[1] robbed Richard Butts at knifepoint, inflicting extensive injuries on him by means of a knife and fists, and forcibly removing his watch and money. Mr. Butts, who had known respondent for at least four years, identified him as one of the perpetrators that same day.[2]

Respondent was arrested and charged with three counts of robbery, two counts of assault and one count of grand larceny.[3] On October 26, 1976, a jury convicted him of robbery and assault. On January 17, 1977, respondent was sentenced as a second felony offender, pursuant to New York Penal Law § 70.06, to an indeterminate term of imprisonment of seven and one-half to fifteen years.

Following his conviction, a notice of appeal to the Appellate Division of the Supreme Court of New York was filed on respondent's behalf. The Appellat Division, Second Department, granted respondent permission to proceed *in forma pauperis* and assigned Michael W. Melinger, Esq., to prosecute respondent's appeal.

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[1] The accomplices were never apprehended.

[2] This one-to-one confrontation was the subject of a pre-trial hearing held on October 20, 1976. The presiding judge declined to rule on whether this identification procedure was suggestive, but held that the identification was based upon an independent source, because Mr. Butts had known respondent for a number of years before this incident.

[3] Respondent was indicted for First Degree Robbery (N.Y. Penal Law § 160.15[3]), Second Degree Robbery (N.Y. Penal Law § 160.10[1] & [2]), Assault in the Second Degree (N.Y. Penal Law § 120.05[2] & [6]) and Grand Larceny in the Third Degree (N.Y. Penal Law § 155.30[5]).

Mr. Melinger and respondent communicated by letter. Respondent suggested eight possible claims of error for appeal, including a claim that his trial counsel was incompetent. Mr. Melinger replied that, in his professional opinion, the suggested claims would not aid respondent in obtaining a new trial and listed seven potential claims of error which he was considering for inclusion in his brief. He requested respondent's "reflections and suggestions" with regard to these. There is no indication that respondent ever replied to this letter or indicated which, if any, of these seven issues he wanted raised on appeal.

On respondent's behalf Mr. Melinger submitted a brief to the Appellate Division, Second Department, in February 1978. (Appendix I to Document 5 of the Record on Appeal). The brief presents the facts in a manner favorable to respondent, highlighting every weakness in the prosecution's case, and advocates three separate grounds for reversing the judgment of conviction. The claims of error raised were: (1) that the trial court improperly barred cross-examination of the complainant with regard to his psychiatric history; (2) that the trial court erred in its determination that Mr. Butts' identification of respondent was predicated upon an independent source; and (3) that the trial court's cross-examination of respondent resulted in the denial of a fair trial. Counsel's discussion of the pertinent case law and numerous references to relevant sections of the transcript indicated his complete familiarity with respondent's trial and the legal issues.

Respondent also filed several *pro se* briefs in the Appellate Division, in which he raised numerous additional points, including each of the issues he now claims his appellate counsel should have raised.

On May 4, 1978, following oral argument, the Appellate Division affirmed the judgment of conviction without opinion. In its order, the court indicated that it had

considered both Mr. Melinger's brief and respondent's *pro se* briefs in reaching its decision.

On July 20, 1978, leave to appeal to the New York Court of Appeals was denied. In an application to the Court of Appeals dated March 21, 1980, respondent sought reconsideration of the denial of leave. In that application respondent raised for the first time the claim that he had received ineffective assistance of counsel on appeal. The application was denied on April 16, 1980.

Federal Court Proceedings

In 1978, respondent brought an application in the United States District Court for the Eastern District of New York for a writ of *habeas corpus*, raising five claims of error, including a claim that he was deprived of effective assistance of counsel at trial.

Applying the "farce and mockery" standard enunciated in *United States* v. *Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950), the Honorable Eugene H. Nickerson held that respondent had received effective assistance from his assigned trial counsel and dismissed the petition on November 28, 1978. On May 10, 1979, the Court of Appeals for the Second Circuit affirmed this judgment without opinion. *Barnes* v. *Jones*, 607 F.2d 944 (2d Cir. 1979).

Respondent then filed his second application for a writ of *habeas corpus*, contending this time that he had been denied effective assistance of appellate counsel. This second application underlines this petition for a writ of certiorari. By a Memorandum and Order dated January 29, 1981, Judge Nickerson denied respondent's application, concluding that the performance of respondent's appellate counsel violated neither the "farce and mockery" standard, "nor any other standard which could reasonably be applied."

A certificate of probable cause was issued by the District Court on April 13, 1981. The United States Court of Appeals for the Second Circuit reversed the District Court and ordered the issuance of a writ of *habeas corpus* within a reasonable time, not to exceed ninety days, unless respondent was assigned counsel and granted a new State appeal. *Barnes* v. *Jones*, 665 F.2d 427 (2d Cir. 1981) (Oakes and Blumenfeld, JJ.; Meskill, J., dissenting). The majority held that respondent had been denied effective assistance of appellate counsel because his attorney failed to raise on appeal every nonfrivolous issue requested by respondent. The State applied for a rehearing *en banc*, which was denied on January 25, 1982, with Judge Meskill dissenting. The Court of Appeals has stayed its mandate until April 10, 1982, to permit petitioner to prepare and file this petition for a writ of certiorari. Respondent is presently incarcerated.

Summary of Argument

The Court of Appeals for the Second Circuit has held that on appeal from a criminal conviction, the Sixth and Fourteenth Amendments to the United States Constitution require assigned counsel to raise every nonfrivolous claim of error suggested by his client. By its decision, the Court of Appeals has established a more stringent standard for the performance of assigned appellate counsel than the standard of any other circuit, and also a standard for appellate counsel more stringent than the standard applicable to trial counsel in the Second Circuit or any other circuit. This standard is so extreme in its formulation that the result is the effective prohibition of the exercise of professional judgment by assigned appellate attorneys.

Moreover, the standard permits courts too readily to find ineffective assistance of counsel, and thereby to circumvent the doctrines of exhaustion, procedural default, and other procedural barriers to federal review of state

convictions. Thus, the Second Circuit's rule threatens to undermine the careful allocation of jurisdiction between the state and federal courts.

This Court should grant the petition for certiorari, reverse the decision below, and hold that a criminal defendant receives effective assistance of appellate counsel within the meaning of the United States Constitution when his counsel satisfies a standard of reasonable professional competence.

ARGUMENT

The Court Of Appeals For The Second Circuit Erred In Holding, Contrary To Four Other Circuits, That The Sixth Amendment Requires Assigned Appellate Counsel To Raise On Appeal Of A Criminal Conviction Every Nonfrivolous Issue Suggested By The Defendant.

The Second Circuit has held in this case that the Sixth Amendment requires an attorney, assigned to represent an indigent criminal defendant on appeal, to raise every nonfrivolous issue suggested by the defendant. This rule establishes a standard of performance for assigned appellate counsel more stringent than the standard for appellate counsel established by any other circuit which has considered the issue.

Every other circuit that has considered the standard for appellate counsel holds that the constitutional requirement of effective assistance is satisfied if appellate counsel performs with reasonable professional competence. *See Cerbo* v. *Fauver*, 616 F.2d 714, 718-19 (3rd Cir.), *cert. denied*, 449 U.S. 858 (1980); *Harshaw* v. *United States*, 545 F.2d 455, 457 (8th Cir. 1976); *Gustave* v. *United States*, 627 F.2d 901, 906 (9th Cir. 1980); *Gillihan* v. *Rodriguez*, 551 F.2d 1182, 1188-89 (10th Cir.),

cert. denied, 434 U.S. 845 (1977); *see also Gilbert* v. *Sowders*, 646 F.2d 1146, 1149-50 (6th Cir. 1981) (concurring opinion).

Furthermore, the standard established in this case is more stringent than the standard established by the Second Circuit itself, or any other circuit, for the performance of assigned counsel in the trial of a criminal case. For trial counsel, most circuits hold that the Constitution is satisfied if counsel performs with reasonable professional competence. *See United States* v. *Bosch*, 584 F.2d 1113 (1st Cir. 1978); *Moore* v. *United States*, 432 F.2d 730 (3d Cir. 1970); *Marzullo* v. *Maryland*, 561 F.2d 540 (4th Cir. 1977); *Nelson* v. *Estelle*, 642 F.2d 903 (5th Cir. 1981); *Beasley* v. *United States*, 491 F.2d 687 (6th Cir. 1974); *United States ex rel. Williams* v. *Twomey*, 510 F.2d 634, 640 (7th Cir.), *cert. denied*, 423 U.S. 876 (1975); *Morrow* v. *Parratt*, 574 F.2d 411 (8th Cir. 1978); *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1328-30 (9th Cir. 1978) (en banc), *cert. denied*, 440 U.S. 974 (1979); *Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc), *cert. denied*, 445 U.S. 945 (1980); *United States* v. *DeCoster*, 624 F.2d 196, 202-07 (D.C. Cir. 1973) (en banc). The Second Circuit requires only performance that avoids making a "farce and mockery of justice". *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950).[4]

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[4] It is somewhat ironic that the Second Circuit imposes a less stringent standard than any other circuit for the performance of trial counsel, and at the same time has in this case announced a more stringent standard than that of any other circuit for the performance of appellate counsel.

The instant case is illustrative of these disparate standards. In respondent's first petition for a writ of *habeas corpus* the district court held that respondent was not denied effective assistance of trial counsel since his attorney's action did not reduce the trial to a "farce and mockery". The Second Circuit affirmed the district

[Footnote continued on following page]

The question of the proper standard of review of the performance of appellate counsel is an important one which has not been addressed by this Court since 1967. *Anders* v. *California*, 386 U.S. 738 (1967). Because of the importance of the issue and the conflict among the circuits this Court should grant the petition for certiorari.

To require assigned appellate counsel to brief and argue every colorable or nonfrivolous claim suggested by his client [5] is to require counsel to abandon professional judgment and, indeed, to provide an indigent defendant with representation that is less than fully effective and below the quality that would be provided by retained counsel. Under the rule set forth by the Second Circuit, assigned appellate counsel must adopt a shotgun approach to appeals, raising every conceivable issue to protect themselves from charges of ineffective assistance. *See Ennis* v. *LeFevre*, 560 F.2d 1072 (2d Cir. 1977); *LiPuma* v. *Commissioner*, 560 F.2d 84 (2d Cir.), *cert. denied*, 434 U.S. 861 (1977). An indigent defendant is thereby deprived of an important aspect of effective legal representation: strategic determinations based upon experience, training, and educated judgment. Counsel might well believe that it would undermine a strong point to attach a long list of colorable claims, but the Second Circuit rule would require the long list.

This approach to appeals is contrary to the efficient administration of justice, because it fails to tell the already overburdened reviewing court which claims deserve

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court's decision without opinion and, thus, that ruling stands. In the instant case, which is grounded on a second petition, the Second Circuit held that respondent was denied effective assistance of appellate counsel, because his appellate counsel failed to challenge the effectiveness of trial counsel, despite the fact that this challenge had been rejected under the Second Circuit's own rule.

[5] The Court of Appeals used the terms "colorable" and "nonfrivolous" interchangeably, 665 F.2d at 438, and that usage is followed here.

the most time and painstaking attention. Indeed, the presentation of a multitude of colorable claims could often result in distracting the attention of an appellate court from the one or two truly meritorious claims contained in an appeal.

Moreover, courts generally impose page limits on appellate briefs, and time limits on oral argument. *See, e.g.*, Supreme Court of the United States, Rule 34(3) (page limits) and Rule 38(3) (time limits); McKinney's 1981 New York Court Rules, Appellate Division, Second Department, § 670.17(g)(2) (page limits) and § 670.22 (time limits).

In *Anders* v. *California*, *supra*, this Court held that assigned appellate counsel must brief and argue all nonfrivolous appeals. That sound rule has been given an unwarranted extension by the Second Circuit, which holds that counsel must include in the appeal all colorable claims suggested by their untrained and legally unsophisticated clients. The ambiguity of the term colorable, and counsel's awareness that the merit of each claim will be judged by 20-20 hindsight, will in all likelihood result in the presentation to the reviewing court of every issue suggested by the defendant. Thus, the system of review established by the court below ill serves both indigent defendants and appellate courts.

In formulating a standard for determining the effectiveness of trial counsel, this Court and every Court of Appeals has recognized the importance of leaving room for the exercise of professional judgment. *Henry* v. *Mississippi*, 379 U.S. 443, 451-52 (1965); *United States* v. *Bosch*, 584 F.2d 1113, 1121 (1st Cir. 1978); *United States ex rel. Cruz* v. *LaVallee*, 448 F.2d 671, 679 (2d Cir. 1971), *cert. denied*, 406 U.S. 958 (1972); *United States* v. *Williams*, 631 F.2d 198, 201-02 (3d Cir. 1980); *Tompa* v. *Commonwealth*, 331 F.2d 552, 554 (4th Cir. 1964); *Jackson* v. *Estelle*, 548 F.2d 617, 619 (5th Cir.

1977); *Wiley* v. *Sowders*, 647 F.2d 642, 648-50 (6th Cir. 1981); *United States ex rel. Robinson* v. *Pate*, 312 F.2d 161, 162 (7th Cir.), *cert. denied*, 373 U.S. 968 (1963); *Wilson* v. *Sigler*, 285 F.2d 372, 376-77 (8th Cir. 1961); *Myers* v. *Rhay*, 577 F.2d 504, 512 (9th Cir.), *cert. denied*, 439 U.S. 968 (1978); *United States* v. *Beckman*, 662 F.2d 661, 662-63 (10th Cir. 1981); *Bolden* v. *United States*, 266 F.2d 460, 461 (D.C. Cir. 1959). Trial counsel is constitutionally required to consider every contention suggested by his client, but is ultimately responsible for the choice of strategy in the defense of the case. For that reason, in reviewing claims of ineffective assistance of trial counsel, the courts have declined to hold that a lawyer must present every nonfrivolous defense, but instead have required, at most, that the lawyer act with "reasonable competence". Indeed, the Second Circuit does not even hold trial counsel to the standard of reasonable competence, but requires only that trial counsel avoid reducing the trial to a "farce and mockery". *United States* v. *Wight, supra.*

While appellate counsel performs a somewhat different function, the constitutional standard for effective assistance can be no different. Appellate counsel, no less than trial counsel, to be effective, must exercise professional judgment.

In his direct appeal to the Appellate Division, respondent was provided with counsel who presented numerous claims of reversible error in an orderly, lawyer-like manner. Counsel's performance was plainly effective under the prevailing standard of reasonable competence, and *a fortiori* under the Second Circuit standard of performance that merely requires counsel to avoid making a farce and mockery of justice.

If the decision of the Second Circuit stands, appellate practice in criminal cases will be radically altered. Additionally, the careful allocation of jurisdiction between

state and federal courts will be seriously threatened. Congress and this Court have imposed reasonable limitations on the circumstances under which a state prisoner can challenge his conviction in federal court. *See, e.g.*, 28 U.S.C. § 2254(a); *Wainwright* v. *Sykes*, 433 U.S. 72 (1977); *Fay* v. *Noia*, 372 U.S. 391 (1963). Any such limitation can be circumvented, however, on a finding that defendant was denied effective assistance of counsel in the state courts. If the standard is set unreasonably high and courts too readily find ineffective assistance when, in fact, counsel performed in accordance with the constitutional standard of reasonable competence, then federal courts in general, and this Court in particular, will be inundated with claims that would otherwise be barred.

This Court should grant the writ in this case to reverse the decision of the Second Circuit and to establish that the standard of reasonable professional competence is the correct measure by which to determine whether counsel has provided assistance that is constitutionally adequate.

CONCLUSION

For the foregoing reason, the petition for a writ of certiorari to the United States Court of Appeals for the Second Circuit should be granted.

Dated: Brooklyn, New York
March, 1982.

Respectfully submitted,

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Appendix

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 135, Docket 81-2082

(Argued Sept. 15, 1981 Decided Nov. 23, 1981)

DAVID BARNES,

Petitioner-Appellant,

—v.—

EVERETT W. JONES, Superintendent Great Meadow Correctional Facility and the State of New York,

Respondents-Appellees.

Appeal was taken from judgment of the United States District Court for the Eastern District of New York, Eugene H. Nickerson, J., denying application of state prisoner for writ of habeas corpus. The Court of Appeals, Oakes, Circuit Judge, held that: (1) where a defendant on appeal urges his counsel to make a nonfrivolous argument, appointed counsel has a duty not only to raise such a nonfrivolous argument, but to advocate it conscientiously on appeal, and (2) on appeal to the New York Appellate Division, issues urged by defendant that trial counsel provided inadequate representation and that trial court erred in refusing to charge accessorial liability were colorable and should have been argued by appointed appellate counsel, and thus counsel on appeal rendered ineffective assistance in failing to do so.

Reversed and remanded with directions.

Meskill, Circuit Judge, filed dissenting opinion.

SHEILA GINSBERG RIESEL, New York City (Alan Mansfield, New York City and Phillips, Nizer, Benjamin, Krim & Bellou, New York City, of counsel), *for Petitioner-Appellant.*

KAREN M. WIGLE, Asst. Dist. Atty., Brooklyn, N.Y. (Eugene Gold, Dist. Atty., Kings County, Brooklyn, N.Y., of counsel), *for Respondents-Appellees.*

Before:

OAKES and MESKILL, *Circuit Judges* and BLUMENFELD, *District Judge.**

OAKES, *Circuit Judge:*

This appeal involves the extent of an indigent criminal defendant's right to competent counsel on appeal from a New York State criminal conviction and the extent of his appellate counsel's duty to raise and argue particular issues at the defendant's request. The case arises out of the denial of a habeas petition by the United States District Court for the Eastern District of New York, Eugene H. Nickerson, Judge, in connection with appellant Barnes's conviction of robbery in the second degree and assault in the second degree in the New York Supreme Court, Kings County, where he received a sentence of two concurrent terms of seven and one-half to fifteen years and three and one-half to seven years, respectively. Because we find that the defendant had successfully exhausted state remedies and we think that appellate counsel owed a duty to his client to pursue colorable claims on appeal in the state court, we reverse the judgment below.

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* Of the District of Connecticut, sitting by designation.

Appendix—Second Circuit Opinion

I. FACTS

A. *The State Court Proceedings.*

1. *Trial.* David Barnes was charged with first and second degree robbery, second degree assault, and third degree larceny in connection with the robbery and stabbing of Richard Butts. The State's case relied primarily on the testimony of Butts who claimed that Barnes, whom he had known in the past as "Froggy," had been one of his four assailants. After testifying falsely about where he had been immediately preceding the robbery, the complainant Butts recollected that it was Barnes who had grabbed him from behind, though he conceded that Barnes was not the one who took his watch and that he did not know which of the four actually took his money. This identification, which was held to rest on the independent basis of Butts's previous familiarity with Barnes, was critical to the prosecution's case because the court found Butts's subsequent bedside identification of Barnes to have been "the worst possible way of having a showing made." On cross-examination defense counsel sought to impeach Butts's credibility by introducing a psychiatric medical report which suggested that Butts had a history of "blacking out." When counsel asked Butts whether he had ever undergone psychiatric treatment, however, the trial court *sua sponte* directed Butts not to answer. Trial counsel did not at that time provide the court with an offer of proof to establish the relevancy of the "blacking out" to Butts's ability to identify Barnes.

Barnes testified on his own behalf and presented the alibi that he was home with his father during the time Butts claimed the robbery occurred. Counsel did not, however, call Barnes's father as a witness, nor did he allude to Barnes's alibi testimony in summation. At the close of the evidence, defense counsel did request the court

to charge the jury on accessorial liability—that a defendant cannot be held criminally liable for the acts of another unless he knew of the acts and intended the result—but the court declined to do so.

2. *The Appeal to the Appellate Division.* Barnes's application for leave to appeal in forma pauperis was granted by the Appellate Division, Second Department, on March 4, 1977, and new counsel, Michael Melinger, Esq., was appointed to prosecute Barnes's appeal. Barnes and his appellate counsel communicated in writing and on November 7, 1977, Barnes wrote to Mr. Melinger advising him of the arguments that he wanted made on appeal, including specifically that identification testimony should have been suppressed because it was a product of an unconstitutional pretrial show-up, that the Assistant District Attorney's cross-examination of Barnes exceeded permissible legal limits, that the trial court improperly excluded the psychiatric evidence, and that Barnes had been denied effective assistance of trial counsel. Barnes accompanied his letter with a supplementary brief.

In a letter dated November 9, Mr. Melinger replied that he would not argue that trial counsel ineffectively represented Barnes, explaining that "[n]ew facts, or new factual arguments, that existed and were readily determinable at trial, are not of assistance to us at this time," apparently under the mistaken belief that the ineffectiveness claim was not cognizable on appeal.[1] He also declined to argue that the show-up was unconstitutional, but indicated that he would argue that the facts adduced at the *Wade* hearing relative to Butts's prior acquaintance

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[1] With respect to matters dehors the record counsel had available the remedy of returning to the trial court in a coram nobis proceeding to supplement the record if necessary. *See, e.g., People* v. *Becvar*, 50 Misc.2d 249, 269 N.Y.S.2d 983 (Dist.Ct., Suffolk Co. 1966).

did not substantiate the court's determination of an independent identification. Finally, counsel identified six other claims worth raising on appeal including that the court improperly barred introduction of medical or psychiatric testimony concerning the complaining witness, that the prosecution's summation was improper, and that the court erred in examining Barnes and in denying the defense's requested charge. Counsel also agreed to submit Barnes's own supplementary pro se brief, while stating that he did not necessarily agree with the points made. He then sent Barnes a draft brief that raised only three of the seven points endorsed by his letter of November 9, 1977, and Barnes filed a subsequent second pro se brief. Mr. Melinger did not send Barnes a copy of the State's brief replying to his pro se briefs until after the oral argument. At oral argument Mr. Melinger argued the questions raised in his own brief, but asserted none of the arguments raised in the pro se briefs. By summary order without opinion the Appellate Division affirmed the conviction on both counts and leave to appeal to the Court of Appeals was denied on July 20, 1978.

3. *Subsequent State and Federal Proceedings.* Barnes then brought in the United States District Court for the Eastern District of New York a pro se petition for a writ of habeas corpus, which raised the four substantive issues originally presented in Barnes's first pro se brief to the Appellate Division. Barnes challenged the exclusion of the psychiatric report, the show-up procedure, and the allegedly improper examinations of Barnes by the prosecutor [2] and the trial court.[3] He also claimed that

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[2] The prosecutor attempted to impeach Barnes on cross-examination by calling attention to a prior burglary for which Barnes had never been convicted:

Q. Were you ever convicted of burglary?

A. No, I wasn't never convicted of burglary.

[Footnote continued on following page]

trial counsel was ineffective, particularly in his failure to call Barnes's father as a witness to substantiate the alibi. The district court denied the writ after judging Barnes's ineffectiveness claim under the "farce and mockery" standard enunciated by the Court of Appeals for the Second Circuit in *United States* v. *Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950).[4]

Q. Were you convicted of the crime of burglary in 1970 and placed on probation for five years?

A. A burglary in 1970?

Q. No? I'm mistaken.

MR. SCHMULKER: May the jury be instructed that no infernce can be drawn from it?

THE COURT: Are you finished with that?

MR. SILVERMAN: Yes, Judge.

THE COURT: The jury will not draw any inferences from the question asked.

[3] During the cross-examination of Barnes by the Assistant District Attorney, Barnes stated that he had left his house at 3:00 P.M. to pick up a welfare check. The trial judge then interrupted:

THE COURT: You mean you're collecting welfare?

THE WITNESS: Yes.

THE COURT: While you were working off the books?

THE WITNESS: Yes.

THE COURT: Go ahead. Do you have any more questions, Mr. Silverman [the Assistant District Attorney]?

[4] New York State does not follow the Second Circuit's standard for determining effectiveness of counsel, *see* text *infra* at 434-435. In 1976 it was observed that "particulraly in view of this court's promotion of higher standards of advocacy, in the wake of Chief Judge Kaufman's well-chosen remarks [in Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A.J. 175 (1974)], . . . the time has come to follow the lead of the six other circuits (including the originating circuit) that have rejected the ['farce and mockery'] rule of *Diggs* v. *Welch*, 80 U.S.A.App.D.C. 5, 148 F.2d 667, *cert. denied*, 325 U.S. 889, 65 S.Ct. 1576, 89 L.Ed. 2002 (1945)." *Rickenbacker* v. *Warden*, 550 F.2d 62, 67 (2d Cir. 1976) (Oakes, J., dissenting), *cert. denied*, 434 U.S. 826, 98 S.Ct. 103, 54

[Footnote continued on following page]

Thereafter Barnes petitioned the New York State Court of Appeals for reconsideration of its denial of leave to appeal and also filed a motion under N.Y.Crim. Proc. Law § 440.20 challenging his sentence. Both applications were denied; leave to appeal those rulings was similarly denied. He then filed in the Eastern District the petition for a writ of habeas corpus underlying this appeal, in which he makes a constitutional challenge principally on the basis of the ineffective assistance of his state appellate counsel. The district court found that Barnes had exhausted his state remedies by alleging ineffective assistance of appellate counsel in his petition for reconsideration of the New York State Court of Appeals' denial of leave to appeal, but dismissed the petition for the writ in an opinion below. Although relying upon

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L.Ed.2d 85 (1977). Three years later, Judge Mansfield similarly urged that "[i]n view of the fact that 9 circuits have adopted a different test along the lines of 'reasonable competence,' leaving only the Second and Tenth Circuits adhering to the old rule, . . . this court should reevaluate the standard to be applied . . . ." *Indiviglio* v. *United States*, 612 F.2d 624, 632 (Mansfield, J., dissenting). Now that the Tenth Circuit has adopted a requiremnt that defense counsel act in a reasonably competent and skillful manner, *see Dyer* v. *Crisp*, 613 F.2d 275 (10th Cir. 1980), the Second Circuit is alone in requiring that defense counsel's inadequate performance be "of such a kind as to shock the conscience of the Court and make the proceedings a farce and mockery of justice." *Twitty* v. *Smith*, 614 F.2d 325, 333 (2d Cir. 1979), (*quoting United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950)). This stringent standard has also been rejected as "demean[ing to] the Sixth Amendment's guarantee of meaningful counsel" by several commentators and recent state decisions, as Judge Weinstein noted in *Brinkley* v. *LeFevre*, 621 F.2d 45, 48 (2d Cir.) (Weinstein, J., dissenting), *cert. denied*, 449 U.S. 868, 101 S.Ct. 203, 66 L.Ed.2d 87 (1980). This decision is not based on the "reasonable competence" standard for evaluating attorney effectiveness but, rather is based on *Anders* v. *California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967).

United States v. *Wight* as reenforced by *Rickenbacker* v. *Warden*, 550 F.2d 62 (2d Cir. 1976), *cert. denied*, 434 U.S. 826, 98 S.Ct. 103, 54 L.Ed.2d 85 (1977), the court found appellate counsel's performance adequate even under the more lenient "reasonable competence" standard adopted by other circuits and proposed by some of the judges in this circuit, *see* note 4 *supra*. As to Mr. Melinger's failure to argue all of the points petitioner wanted raised, Judge Nickerson stated that "it is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." This appeal ensued.

II. DISCUSSION

A. *Exhaustion of State-Court Remedies.*

The State, relying upon *Picard* v. *Connor*, 404 U.S. 270, 92 S.Ct. 509, 30 L.Ed.2d 438 (1971), argues that Barnes's claim that he was denied effective assistance of appellate counsel cannot serve as a basis for federal habeas relief because he was required by 28 U.S.C. § 2254(b), (c) (1976) to present this issue to the Appellate Division of the Supreme Court of New York. But on March 21, 1980 Barnes did request that the New York Court of Appeals reconsider its denial of leave to appeal the Appellate Division's affirmance of his conviction. At that time Barnes urged the Court of Appeals to consider whether he had been denied the effective assistance of counsel by appointed counsel's failure to raise and argue colorable issues at Barnes's request. A claim based on the ineffective assistance of counsel in prosecuting an appeal to the New York Appellate Division may be properly raised for the first time on direct appeal to the Court of Appeals. *People* v. *Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979) (remanding to the Ap-

pellate Division for de novo consideration of the appeal following *High* v *Rhay*, 519 F.2d 109, 113 (9th Cir. 1975)).

The State points to section 670.5 of the Appellate Division Court Rules, which permits reargument of a cause or amendment of a decision for good cause shown at any time. *See also* N.Y.Crim.Proc. Law § 470.50. But *Picard* v. *Connor*, 404 U.S. at 275-77, 92 S.Ct. at 512-13, requires only that a claim raised in a federal petition have been previously presented in proper form to a state court. *See also United States ex rel. Ross* v. *LaVallee*, 448 F.2d 552, 553-54 (2d Cir. 1971) (citing *Brown* v. *Allen*, 344 U.S. 443, 448 n.3, 73 S.Ct. 397, 403 n.3, 97 L.Ed. 469 (1953)); *United States ex rel. Leeson* v. *Damon*, 496 F.2d 718, 721 (2d Cir.), *cert. denied*, 419 U.S. 954, 95 S.Ct. 215, 42 L.Ed.2d 172 (1974). The claim must have been properly presented to the state court "at least once, on direct or collateral review." *Fielding* v. *LeFevre*, 548 F.2d 1102, 1106 (2d Cir. 1977). *See also United States ex rel. Irons* v. *Montanye*, 520 F.2d 646, 648-49 (2d Cir. 1975). That collateral relief may be available under N.Y.Crim. Proc. Law § 440.20 is therefore immaterial, *see United States ex rel. Cardaio* v. *Cassales*, 446 F.2d 632, 634 (2d Cir. 1971), and indeed the availability of any such collateral relief for Barnes's claim is in doubt, *see People ex rel. Douglas* v. *Vincent*, 50 N.Y.2d 901, 409 N.E.2d 990, 431 N.Y.S.2d 518 (1980) (Meyer, J., dissenting). The cases upon which the State relies, *United States ex rel. Gibbs* v. *Zelker*, 496 F.2d 991 (2d Cir. 1974); *United States ex rel. Johnson* v. *Vincent*, 507 F.2d 1309 (2d Cir. 1974), *cert. denied*, 420 U.S. 994, 95 S.Ct. 1435, 43 L.Ed.2d 678 (1975); and *Davis* v. *Henderson*, 468 F.Supp. 628 (S.D.N.Y. 1979), are cases in which the habeas petitioner had not fairly presented his claims to *any* state court. Here Barnes properly pre-

sented his claim to the State's highest court and that is all that need be done.

B. *Assistance of Counsel.*

Nearly one half century ago in *Powell* v. *Alabama*, 287 U.S. 45, 68-69, 53 S.Ct. 55, 64-65, 77 L.Ed. 158 (1932), the Supreme Court recognized for the first time that "[t]he right to be heard would be, in many cases, of little avail if it did not comprehend the right to be heard by counsel." In the years that followed the Court established that no indigent defendant may be imprisoned without first having been provided access to appointed counsel, *see Argersinger* v. *Hamlin*, 407 U.S. 25, 92 S.Ct. 2006, 32 L.Ed.2d 530 (1972); *Gideon* v. *Wainwright*, 372 U.S. 335, 83 S.Ct. 792, 9 L.Ed.2d 799 (1963), and that this right applies not only at the trial stage but on appeal as well. *See Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963). Nor is the right to counsel satisfied by appointment of counsel alone; appointed counsel must advocate his client's cause vigorously and competently. *Anders* v. *California*, 386 U.S. 738, 744, 87 S.Ct. 1396, 1400, 18 L.Ed.2d 493 (1967), emphasized that

> [t]he constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of *amicus curiae* . . . . [Counsel's] role as advocate requires that he support his client's appeal to the best of his ability.

This obligation of counsel is stated with equal force in ABA Standards, Criminal Appeals § 3.2 (1970) and accompanying commentary. From this it follows that, as Judge Lumbard pointed out for the majority of the panel in *High* v. *Rhay*, 519 F.2d 109, 112 (9th Cir. 1975) (Lumbard, J., sitting by designation), where an appellant urges his counsel to make a non-frivolous argument,

"[a]ppointed counsel . . . has a duty under *Anders* not only to raise such a non-frivolous argument, but to advocate it conscientiously on appeal."

Appellate counsel need not argue frivolous appeals or raise frivolous issues on appeal, even if his client so requests. If, upon conscientious examination, counsel finds defendant's case to be wholly frivolous, he may so advise the court and request permission to withdraw; the brief to such effect has, of course, come to be known as an *Anders* brief. .*See Anders* v. *California*, 386 U.S. at 744, 87 S.Ct. at 1400. *See also Ellis* v. *United States*, 356 U.S. 674, 675, 78 S.Ct. 974, 975, 2 L.Ed.2d 1060 (1958) (per curiam). Similarly, where defendant's appeal raises both frivolous and colorable (*i.e.*, nonfrivolous) issues, the case law permits counsel to argue only the colorable points and to omit the frivolous arguments that appellant would have him raise. *See, e.g., State ex rel. Henderson* v. *Boone Circuit Court*, 246 Ind. 207, 204 N.E.2d 346 (1965); *Bennett* v. *State*, 161 Me. 489, 214 A.2d 667 (1965). Alternatively, as indicated by the ABA Standards, *supra*, commentary d at 79, appellate counsel may include the frivolous question in his brief but deal with it sketchily, neither developing it in detail nor pressing it on the court. *See Johnson* v. *United States*, 360 F.2d 844, 847 (D.C. Cir. 1966) (concurring opinion); *Wallace* v. *State*, 247 Ind. 405, 215 N.E.2d 354 (1966).

On the other hand, *Anders* compels appointed counsel to argue nonfrivolous appeals at defendant's request. In *Anders*, appointed counsel sought to withdraw from an appeal he believed to be of "no merit." The Court, finding that counsel's "no merit" statement was not equivalent to an evaluation that the appeal was frivolous, held that the withdrawal was improper because an appellant is entitled to counsel on a nonfrivolous appeal. By extension, *Anders* instructs that when, as here, ap-

pellant's appointed counsel intends to argue particular colorable points, but the appellant requests that he raise additional colorable points, counsel must argue the additional points to the full extent of his professional ability. *See High* v. *Rhay*, 519 F.2d at 112-13, followed in *People* v. *Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979).

Appointed counsel's judgment that appellant is unlikely to prevail on the merits of his nonfrivolous arguments is no substitute for an active advocate's presentation of those arguments to the appellate court, which is the appropriate forum for making a decision on the merits. The past half century of Supreme Court decisions confirms that the right to counsel is perhaps the most crucial right afforded criminal defendants. As Justice Schaefer of the Illinois Supreme Court once observed, "Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have." Schaefer, *Federalism and State Criminal Procedure*, 70 Harv.L.Rev. 1, 8 (1957). Thus, appointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial —the very right that an appointment of appellate counsel was designed to preserve. *See Douglas* v. *California*, 372 U.S. at 357-58, 83 S.Ct. at 816-17. *See also Ross* v. *Moffitt*, 417 U.S. 600, 606-07, 94 S.Ct. 2437, 2441-42, 41 L.Ed.2d 341 (1974); *Griffin* v. *Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).

Appellate counsel's error in failing to raise colorable issues at his client's insistence was in no way cured by submission of the defendant's pro se brief. A pro se brief is no substitute for the advocacy of experienced

counsel. *High* v. *Rhay*, 519 F.2d at 113. The pro se briefs filed with the Appellate Division by petitioner here were no exception. They spoke only in generalities and cited a long line of cases without reference to the specific facts in this case relevant to such issues as trial counsel's competency.

Having demonstrated that appointed counsel failed to argue colorable claims at his request, an appellant need not also demonstrate a likelihood of success on the merits of those claims. *See High* v. *Rhay*, 519 F.2d at 113 ("the probabilities are that any review of the record, in light of all the arguments which diligent and experienced counsel may make for High, will still result in affirmance of the conviction"); *Robinson* v. *Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981); *Horsley* v. *Simpson*, 400 F.2d 708, 712 (5th Cir. 1968). This follows from the determination in *Rodriquez* v. *United States*, 395 U.S. 327, 330, 89 S.Ct. 1715, 1717, 23 L.Ed.2d 340 (1969), that in order to establish a Sixth Amendment violation based on counsel's complete failure to file a notice of appeal, a defendant need not even specify the points that appellate counsel should have raised. *See also Entsminger* v. *Iowa*, 386 U.S. 748, 752, 87 S.Ct. 1402, 1404, 18 L.Ed. 2d 501 (1967) (failure to file the entire record on appeal constitutes a violation of the Sixth Amendment).

We then turn to whether the issues raised by Barnes in his pro se petitions and neither argued nor briefed by appellate counsel were indeed colorable or were merely frivolous. In making this determination we look not only to federal constitutional law but also to New York State criminal law.

Barnes' first and most significant claim is that his trial counsel was constitutionally inadequate. The adequacy of trial counsel's performance must be judged, in order to determine its colorability for purposes of argument on a New York appeal, in accordance with the New

York standard, which is one of "reasonable competence," adopted by the courts of New York State prior to Barnes's appeal to the Appellate Division, *see generally People* v. *Aiken*, 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978), and which the State's courts continue to follow, *see, e.g., People* v. *Bell*, 48 N.Y.2d 933, 401 N.E.2d 180, 425 N.Y.S.2d 57 (1979) (as do the courts of appeals of all federal circuits other than our own, *see* note 4 *supra*). The district court's determination in the previous habeas proceeding that the assistance of Barnes's trial counsel did not amount to a "farce and mockery" is therefore not relevant to our determination of whether Barnes's claim of ineffective trial assistance was colorable, as the New York courts employ this different and less stringent standard.

Barnes alleges a number of instances of inadequate representation at trial. He asserts, at the outset, that his trial counsel never adequately prepared or investigated his case. Certainly failure to prepare makes the fundamental right to the assistance of counsel hollow. *See Avery* v. *Alabama*, 308 U.S. 444, 446, 60 S.Ct. 321, 322, 84 L.Ed. 377 (1940) (denial of opportunity for appointed counsel to confer, consult, or prepare converts appointment "into a sham"); *Morrow* v. *Parratt*, 574 F.2d 411 (8th Cir. 1978). The New York courts are in accord, *see People* v. *Gonzalez*, *supra; People* v. *Droz*, 39 N.Y.2d 457, 348 N.E.2d 880, 384 N.Y.S.2d 404 (1976); *People* v. *Bennett*, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972); *People* v. *Gega*, 69 A.D.2d 772, 415 N.Y.S.2d 26 (1st Dep't 1979). Moreover, whether or not attributable to his lack of preparation, trial counsel's failure to call or subpoena Barnes's father to corroborate the alibi defense may in itself constitute error of constitutional dimensions, as the courts of New York have specifically held. *See, e.g., People* v. *Detling*, 73 A.D.2d 937, 423 N.Y.S.2d 509 (2d Dep't 1980) (failure to call

the defendant's father as an alibi witness even though the father had corroborated the alibi before the grand jury deprived the defendant of effective assistance); *People* v. *Zayas*, 61 A.D.2d 594, 403 N.Y.S.2d 519 (1st Dep't 1978) (although the evidence was ample to sustain the conviction, counsel's failure to take appropriate steps to obtain out-of-state alibi witnesses deprived the defendant of a fair trial).

Beyond this, trial counsel erred in not presenting an offer of proof of the relevance of psychiatric evidence indicating the complainant's history of "blacking out." His omission left unchallengeable the trial court's ruling that such evidence was improper, despite the fact that evidence relevant to a complainant's mental condition may be admissible on the issue of credibility, *see e.g.*, *People* v. *Rensing*, 14 N.Y.2d 210, 199 N.E.2d 489, 250 N.Y.S.2d 401 (1964). Similarly, trial counsel's failure to lodge an objection during the prosecutor's summation allowed the prosecutor's inflammatory remarks [5] to go to the jury unchallenged and foreclosed review for all practical purposes. *See* N.Y.Crim.Proc.Law § 470.05(2). *See also* *Commonwealth* v. *Valle*, 240 *Pa.Super.Ct.* 411, 362 A.2d 1021 (1976) (finding ineffectiveness based on trial counsel's failure to object to the prosecutor's argument to the jury calling defendant "vicious" and a "liar"); ABA Standards for Criminal Justice, The Prosecution Function § 5.8(b), (c), and (d).

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[5] "But suddenly, today, Mr. Barnes gets up and tries to create some kind of lie. . . . [Y]ou evaluate him. Does he have an interest in the outcome? Is he more apt to lie than Butts? You better believe it, you better believe it, you better believe it. . . . [I]t's obvious to you, without raising my voice, that on March 16th he [w]as a thief, he was a cheat, he was stealing. I think you all know that you can't work and collect welfare benefits. That's against the law. You think he was any less of a thief on March 15th than he was on March 16th? He made himself out to be what he is, a thief, liar and a cheat."

The State trial court's refusal to charge accessorial liability raised a second colorable claim for appellate review. The trial court declined to instruct the jury that it could find Barnes guilty of the robbery counts only if it found that he possessed the requisite intent and knowledge. A defendant is entitled to an instruction if it is supported by the evidence and sets out a correct declaration of applicable legal standards. *United States* v. *Manning*, 618 F.2d 45, 47-48 (8th Cir. 1980); *People* v. *Wrench*, 34 A.D.2d 1055, 312 N.Y.S.2d 561 (3d Dep't 1970). The robbery statute under which Barnes was convicted requires "forcible stealing," N.Y. Penal Law § 160.00. Because there was no proof that Barnes personally stole the complainant's property, the guilty verdict could only have been predicated on a theory of accessorial liability, which requires mental culpability under N.Y. Penal Law § 20.00. It could well be argued that the failure so to charge the jury unduly prejudiced Barnes's bona fide defense that the act of stealing concededly committed by others could not be attributed to him.

Thus at least two issues were colorable and should have been argued by counsel to the Appellate Division, and counsel on appeal, in failing to do so, must be held to have rendered ineffective assistance.

Nothing that we say here detracts from the proposition—unchallenged by Barnes—that appellate counsel has the authority to make decisions regarding strategies and tactics attendant to his representation, an authority flowing from recognition of counsel's professional training, experience, and well-informed judgment. *See Ennis* v. *LeFevre*, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied*, 435 U.S. 976, 98 S.Ct. 1625, 56 L.Ed.2d 70 (1978). But the decision to forego potentially meritorious issues on appeal requires as much client input as does the decision whether to appeal in the first instance, *see Ennis*, 560 F.2d at 1077 (Gurfein, J., concurring)

(whether to raise an issue, "if a serious [one], may perhaps not be left entirely to the lawyer's decision"). As Code of Professional Responsibility EC7-7 recognizes:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer. As typical examples in civil cases, it is for the client to decide whether he will accept a settlement offer or whether he will waive his right to plead an affirmative defense. A defense lawyer in a criminal case has the duty to advise his client fully on whether a particular plea to a charge appears to be desirable and as to the prospects of success on appeal, but it is for the client to decide what plea should be entered and whether an appeal should be taken.

In the final analysis, as stated in the Code, EC7—8, "the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself." *See also* Model Rules of Professional Conduct rule 1.3 (Discussion Draft, Chicago: American Bar Association, Jan. 30, 1980) ("A lawyer shall accept a client's decisions concerning the objectives of the representation and the means by which they are to be pursued except" where his client's instructions violate the law or the rules of professional conduct or where before or during representation he obtains the client's consent to the limitation), *cited in* Spiegel, *The New Model Rules of Professional Conduct: Lawyer-Client Decision Making and the Role of Rules in Structuring the Lawyer-Client Dialogue*, 1980 Am. Bar Foundation Research J. 1003, 1005. The functions and duties of assigned defense

counsel do not differ from those of retained counsel. *See* ABA Standards for Criminal Justice, The Defense Function 1.1(e).

Here, as in *High* v. *Rhay*, the decision below is reversed and the case is remanded to the district court, which is directed to grant the writ of habeas corpus unless within a reasonable time, not to exceed ninety days, the State assigns new counsel and grants Barnes leave to appeal from his 1978 conviction.

Judgment in accordance with opinion.

MESKILL, *Circuit Judge (dissenting):*

The majority relies principally on *Anders* v. *California*, 386 U.S. 738, 87 S.Ct. 1396, 18 L.Ed.2d 493 (1967), to find that petitioner David Barnes was deprived of the effective assistance of counsel on his state appeal. Because I do not agree that *Anders* supports this result, I dissent.[1]

In *Anders*, the petitioner sought to appeal his conviction for possession of marijuana with the aid of court-appointed counsel. After studying the trial record, appointed counsel informed the appellate court by letter that he believed the appeal to be meritless but that the petitioner nevertheless wished to file a *pro se* brief. The court refused the petitioner's request for appointment of new counsel, considered the appeal on the basis of the petitioner's *pro se* brief and the state's answering brief and unanimously affirmed the conviction. Anders then filed an application for a writ of habeas corpus in the

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[1] On the issue of the exhaustion of state remedies, I agree with the majority's holding that "[h]ere Barnes properly presented his claim to the State's highest court and that is all that need be done." Maj. Op. at 432. My dissent is limited to the resolution of the issue of effective assistance of appellate counsel.

state District Court of Appeal, alleging that he had been denied his right counsel on appeal. That court denied his application. The California Supreme Court then denied a similar application.

The United States Supreme Court granted *certiorari* and reserved the decision of the California Supreme Court. The Court condemned the representation provided by Anders' appellate counsel, stating that he had acted as *amicus curiae* rather than advocate and ruling that such representation had deprived the defendant "that full consideration and resolution" of his appeal compelled by "[t]he constitutional requirement of substantial equality and fair process. . . ." 386 U.S. at 742-44, 87 S.Ct. at 1399-1400.

I agree with the majority that even after *Anders*, an attorney who finds his client's appeal wholly frivolous may so advise the court and request permission to withdraw. Maj. Op. at 433. Similarly, I agree that where a client seeks to raise both frivolous and nonfrivolous issues on appeal, the attorney may properly assert only the colorable claims. Maj. Op. at 433. Nevertheless, the majority finds that *Anders*, which merely holds that appointed counsel must argue nonfrivolous *appeals*, requires "by extension" that appellate counsel raise all *issues* suggested by his client that an appellate court, with the clarifying aid of hindsight, decides are "colorable." I cannot accept this extension of *Anders*.

Like other federal cases finding constitutional violations in state appellate proceedings, *Anders* is based on principles of equality. Although the right to appeal a criminal conviction is not guaranteed by the United States Constitution, the Constitution does require that when a state provides appellate review, it must "assure the indigent defendant an adqeuate opportunity to present his claims fairly in the context of the State's appellate pro-

cess." *Ross* v. *Moffitt*, 417 U.S. 600, 616, 94 S.Ct. 2437, 2446, 41 L.Ed.2d 341 (1974). *See Douglas* v. *California*, 372 U.S. 353, 83 S.Ct. 814, 9 L.Ed.2d 811 (1963); *Griffin* v. *Illinois*, 351 U.S. 12, 76 S.Ct. 585, 100 L.Ed. 891 (1956). The instant case is unlike *Anders*, where appellate counsel's complete refusal to brief and argue claims left the defendant totally without the aid of counsel in pressing his appeal. Here petitioner Barnes complains that his lawyer argued some issues before the appellate court, but declined to argue every nonfrivolous claim that Barnes had requested him to present.

The *Anders* standard for judging the effectiveness of appellate counsel requires "that [appointed counsel] support his client's appeal to the best of his ability." 386 U.S. at 744, 87 S.Ct. at 1400. This Court has recognized that "decisions concerning which legal issues will be urged on appeal are uniquely within the lawyer's skill and competence, and their resolution is ultimately left to his judgment." *Ennis* v. *LeFevre*, 560 F.2d 1072, 1075 (2d Cir. 1977), *cert. denied*, 435 U.S. 976, 98 S.Ct. 1625, 56 L.Ed.2d 70 (1978). A decision not to raise some colorable claim on appeal may be an intelligent and effective tactical choice. Thus, concurring in *Ennis*, Judge Newman commented as follows on appellate counsel's decision not to press a claim urged by the defendant that improper identification evidence was used against him:

> By no stretch of the imagination was petitioner's appellate counsel ineffective in the Sixth Amendment sense. On the contrary, he was most effective. From the possible issues to be raised on appeal, he focused on an important one with the likelihood of success and did not risk obscuring its worth in a welter of trivia. . . . I am entirely satisfied that while a nonfrivolous challenge could have been made, petitioner's appellate counsel cannot be faulted for considering the probability of success too slight to merit inclusion in the initial appeal.

560 F.2d at 1077-78 (Newman, *J.*, concurring). I agree with Judge Newman that in exercising the professional skill and judgment for which he is retained, an appellate lawyer might well decide to forgo presentation of some issues urged by his client precisely to "support his client's appeal to the best of his ability[,]" *Anders*, 386 U.S. at 744, 87 S.Ct. at 1400. The *per se* rule adopted by the majority is unjustified. Rather, once it is shown that appellate counsel filed a brief which presents claims in a lawyer-like manner, the adequacy of that brief should be judged by the normal standard for effective assistance of counsel.

High v. *Rhay*, 519 F.2d 109 (9th Cir. 1975), relied upon heavily by the majority, is consistent with this approach. While the appellate lawyer in *High* did file a brief, the court's opinion makes clear that the brief was so inadequate that the defendant was effectively denied legal representation altogether:

> On January 17, 1972, Munro [(appellate counsel)] filed a four-page "Brief of Appellant," . . . . In this brief counsel did not make even a minimal statement of the facts which were relevant to the appeal. The single "Assignment of Error" was that the trial court erred in finding the defendant guilty. In a three-sentence, eighty-five-word section entitled "Argument of Counsel," the court was simply invited to review the transcript to determine whether the evidence established that High was guilty beyond a reasonable doubt.
>
> . . . .
>
> . . . The "brief" is worthless. It could not have required more than five minutes to draft. No client in his right mind would pay one cent for such a performance. It is difficult to understand how the Washington Court of Appeals could accept

> such a brief and thereafter deny High's motion to relieve Munro and to designate new counsel.

Id. at 111-13. *High* differs drastically from the case before us. The record in this case indicates that appellate counsel, Michael Melinger, studied the trial record, considered several potential grounds for appeal, communicated his opinions to his client requesting thoughts and suggestions, and filed a skillfully drafted brief which set forth the factual and legal bases of the claims that, in his professional judgment, he considered viable. Unlike *High*, there is no indication in this record that Barnes' counsel was merely going through the motions of comlying with the letter of *Anders*.

Even were I to accept the view that the determination of which legal issues to raise on appeal may not always be left entirely to counsel, *see Ennis* v. *LeFevre*, 560 F.2d at 107[illegible]77 (Gurfein, J., concurring), I would not agree with the majority's result in this case. The record does not support the conclusion that Barnes did more than suggest certain claims to his lawyer and accept his lawyer's judgment that these claims were not useful. The majority identifies two issues—ineffective assistance of trial counsel and failure of the trial court to give a charge on accessorial liability—as nonfrivolous issues that Melinger refused to raise despite his client's instructions. The only record support cited by Barnes to demonstrate that he insisted that these issues be raised is a letter to him from Melinger on November 9, 1977, which incorporates by reference a letter he sent to Melinger two days earlier. In his letter Melinger stated:

> I am currently in the process of framing the points of law in your case that I believe are appealable. . . . Please respond with your reflections and suggestions in reference to them. Once I hear from you, I will prepare the brief.

Later in the letter Melinger discussed issues suggested by Barnes and explained that "[n]ew facts, or new factual arguments . . . are not of assistance to us at this time." One of the "new factual arguments" listed by Melinger that was "not of assistance" was the claim of ineffectiveness of trial counsel. Melinger then listed seven issues which he thought had potential merit, including the trial court's failure to give the charge on accessorial liability requested by the defendant.[2]

It is important to note that the failure of the trial court to charge on accessorial liability appears only in the list of issues suggested by Melinger. There is no indication in the record that Barnes ever suggested, let alone insisted, that Melinger raise this claim. In addition, the record contains no indication that Barnes insisted that Melinger raise an ineffective assistance of counsel claim. The record is devoid of evidence of correspondence between Melinger and Barnes from the time Melinger wrote to Barnes in early November 1977 to the time Melinger filed his brief in late February 1978. Thus, there is no indication that Barnes ever responded to Melinger's request for "reflections and suggestions" on the matters discussed in Melinger's letter. Barnes never moved to replace Melinger, as might be expected if a conflict existed. In fact, he sought no relief other than permission to file *pro se* briefs, at least one of which was prepared even before, Melinger began to compose his brief. From this record, the inference that Barnes pressed Melinger to raise the "nonfrivolous" claims identified by the majority is unreasonable.

As a final point, perhaps obvious from the foregoing, I do not believe that Melinger's representation fell below

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[2] Melinger sent a second letter to Barnes after the oral argument of Barnes' appeal before the Appellate Division. Melinger informed Barnes that he limited his presentation to the points raised in his own brief.

the level of "reasonable competence" required of defense counsel in other circuits, let alone the more stringent "farce and mockery" standard employed by this Court. *See* Maj. Op. at 294 n.4. It is clear from the brief filed by Melinger that he reviewed the entire trial record, identified potentially meritorious issues, and forcefully presented claims of error through citation to pertinent portions of the record and to applicable precedent. While with the benefit of hindsight we may be able to find enough merit in claims rejected by Melinger to label them "nonfrivolous," it does not follow that Melinger's decision not to raise them rendered his performance constitutionally inadequate. Neither has Barnes demonstrated that Melinger's failure to raise the claims identified by the majority "resulted from neglect or ignorance rather than from informed, professional deliberation[,] . . ." *Marzullo* v. *Maryland*, 561 F.2d 540, 544 (4th Cir. 1977), *cert. denied*, 435 U.S. 1011, 98 S.Ct. 1885, 56 L.Ed.2d 394 (1978). Certainly it cannot be said that Melinger's advocacy turned the appellate proceeding into a "farce and mockery of justice[,]" *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950, 70 S.Ct. 478, 94 L.Ed. 586 (1950).

I would affirm Judge Nickerson's decision.

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

DAVID BARNES,

Petitioner,

—against—

E. W. JONES Superintendent, Great Meadow Correctional Facility and the State of New York,

Respondent.

DAVID BARNES, Pro Se
Comstock, New York

EUGENE GOLD, *District Attorney of Kings County*
(Karen M. Wigle, *Assistant District Attorney, of Counsel*)
Brooklyn, New York
for Respondent

NICKERSON, *District Judge*

FILED: In Clerk's Office
U.S. District Court E.D. N.Y.

★ JAN 30 1981 ★
Time A.M. .....
P.M. .....

80 C 2447

Memorandum and Order

Petitioner seeks a writ of habeas corpus vacating his conviction and sentence in the New York State courts of robbery in the second degree and assault in the second degree, claiming that he was denied effective assistance of counsel on direct appeal of his convictions to the Appellate Division and the New York Court of Appeals.

Appendix—District Court Opinion

Petitioner was convicted by a jury on October 26, 1976 and was thereafter sentenced to concurrent terms of seven and one half to fifteen years and three and one half to seven years. He was granted leave to appeal *in forma pauperis* and Barry G. Rhodes, Esq. was originally appointed to represent him on that appeal. On June 24, 1977 assigned counsel was relieved and Michael W. Melinger, Esq. was appointed in his place.

Petitioner and his new counsel corresponded concerning the points to be raised on appeal. While counsel did not agree that all of the arguments raised by petitioner had legal merit, he submitted a brief alleging the following errors at trial: 1) exclusion of evidence relating to the psychiatric history of the complaining witness, 2) failure to suppress an in-court identification despite a suggestive pre-trial show-up, and 3) improper cross-examination of the defendant by the judge. Petitioner also submitted two *pro se* briefs alleging that: 1) his pre-trial identification was impermissibly suggestive, 2) he was not provided with effective trial counsel, 3) he was impermissibly cross-examined about an offense of which he was acquitted, 4) the court excluded evidence tending to impeach government testimony, 5) defendant's jury charge request on the elements of accessorial liability was improperly denied, 6) the court improperly expressed an opinion of the defendant, and 7) the prosecutor's summation was improper. In oral argument before the Appellate Division, Second Department, attorney Melinger argued only the points presented in his own brief.

Petitioner's conviction was unanimously affirmed, without opinion. *People* v. *Barnes*, 405 N.Y.S.2d 621 (2d Dept. 1978). On July 20, 1978, leave to appeal to the New York State Court of Appeals was denied.

Petitioner thereafter brought a *pro se* petition for a writ of habeas corpus in this court, alleging four of the

grounds asserted in his direct appeal: 1) exclusion of evidence as to psychiatric history of the defendant, 2) failure to suppress identification testimony, 3) improper cross-examination by prosecutor and court, and 4) ineffective assistance of trial counsel. The petition was denied by Memorandum and Order of this court dated November 27, 1978.

Petitioner subsequently petitioned the New York State Court of Appeals for reconsideration of its denial of leave to appeal and brought a motion to set aside his sentence pursuant to N.Y.Crim.P.L. § 440.20. Both applications were denied. On May 5, 1980, petitioner applied for leave to appeal these rulings. In an order dated October 3, 1980, leave to appeal was denied. On September 8, 1980, the present petition was filed.

Section 2254(b) of Title 28 of the United States Code provides that, "[a]n application for a writ of habeas corpus . . . shall not be granted unless it appears that the applicant has exhausted the remedies available in the court of the State, or that there is either an absence of available State corrective process or the existence of circumstances rendering such process ineffective to protect the rights of the prisoner." Respondent admits petitioner alleged ineffective assistance of appellate counsel in his petition for reconsideration of the New York State Court of Appeals' denial of leave to appeal his convictions. Petitioner also contends that the issue was raised in his appeal of the denial of his § 440.20 motion.

Respondent contends that although the issues were raised in these proceedings, petitioner's state remedies are not exhausted since the courts' summary denials did not address the merits of the claim and since the New York State Court of Appeals might in its discretion allow petitioner to move to reargue his appeal, although the ordinary time for such a motion has long since passed. However,

this court cannot assume, even in the absence of a written opinion, that a state court has failed to consider issues brought before it, and the mere speculation that relief might be had in some additional state proceeding does not prevent federal habeas corpus review, as long as the claim asserted was at some point raised on its merits before the state courts. *Klein* v. *Harris*, No. 78-1539 (E.D.N.Y. September 25, 1980) (Nickerson, J.). This court may determine the merits of petitioner's claim.

The standard by which ineffectiveness of counsel is measured in this circuit remains the very stringent requirement that the defndant show that counsel's errors were "of such a kind as to shock the conscience of the Court and make the proceedings a farce and a mockery of justice." *Rickenbacker* v. *Warden*, 550 F.2d 62, 65 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977), *quoting United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). While this standard has come under attack as unduly restrictive, *see, e.g. Indiviglio* v. *United States*, 612 F.2d 624, 632 (2d Cir. 1979) (Mansfield, J., concurring); *Rickenbacker* v. *Warden, supra*, at 66 (Oakes, J., dissenting), it is apparent that petitioner's counsel's performance violated neither that standard nor any other standard which could reasonably be applied.

Petitioner's attack on his appellate counsel's performance centers on counsel's failure to include in his brief and argument all of the points which petitioner wished raised, and counsel's failure to provide petitioner with a copy of the government's reply brief until after oral argument was heard. Neither of these points merits the conclusion that appellate counsel's performance fell below professional norms. It is not required that an attorney argue every conceivable issue on appeal, especially when some may be without merit. Indeed, it is his professional duty to choose among potential issues, according to his

judgment as to their merit and his tactical approach. Nor was petitioner prejudiced by the timing of his receipt of the government's brief on his direct appeal.

The petition for a writ of habeas corpus is denied. So ordered.

Dated: Brooklyn, New York
January 29, 1981

EUGENE H. NICKERSON, *U.S.D.J.*

/s/ .....
EUGENE H. NICKERSON, *U.S.D.J.*

The Clerk shall make copies of this Memorandum and Order and serve it upon the parties.

Joint Appendix

Supreme Court, U.S.
FILED
AUG 30 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1794

IN THE

Supreme Court of the United States

October Term, 1982

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,

Petitioner,

—against—

UNITED STATES OF AMERICA ex rel. DAVID BARNES,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

JOINT APPENDIX

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Counsel for Respondent

PETITION FOR CERTIORARI FILED MARCH 25, 1982
CERTIORARI GRANTED JUNE 7, 1982

IN THE

Supreme Court of the United States

October Term, 1982

No. 81-1794

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,
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—against—

UNITED STATES OF AMERICA ex rel. DAVID BARNES,
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THE UNITED STATES COURT OF APPEALS
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The following Opinions and Orders have been omitted in printing this Appendix because they appear on the following pages in the Appendix to the printed petition for Certiorari:

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Chronological List of Relevant Docket Entries

State Court Proceedings

April 28, 1976	Defendant arraigned on Indictment in Supreme Court of the State of New York, Kings County; plea of not guilty entered.
October 20, 1976	Hearing on defendant's motion to suppress identification testimony; motion denied.
October 22, 1976	Jury trial commenced.
October 26, 1976	Guilty verdict entered.
January 17, 1977	Sentence imposed and judgment of conviction entered.
On or about January 24, 1977	Defendant's Notice of Appeal filed in the Appellate Division, Second Department.
March 4, 1977	Barry Rhodes, Esq. assigned to prosecute defendant's appeal.
June 24, 1977	Barry Rhodes relieved and Michael Melinger, Esq. assigned.
February 23, 1978	Defendant's first *pro se* brief, dated September 6, 1977, and Melinger's brief filed.
On or about March 1, 1978	Defendant's second *pro se* brief filed.

March 22, 1978	Defendant's third *pro se* brief filed.
May 4, 1978	Brief of Assistant District Attorney Sharen Litwin filed.
May 4, 1978	Oral argument.
May 22, 1978	Judgment of conviction affirmed.
July 20, 1978	Leave to appeal to the New York Court of Appeals denied.
Federal Court Proceedings	
August 8, 1978	Defendant's first petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of New York.
November 27, 1978	Petition denied.
May 10, 1979	Denial of petition affirmed by the United States Court of Appeals for the Second Circuit.
October 1, 1979	Defendant's petition for a writ of certiorari denied by the United States Supreme Court.
State Court Proceedings	
March 4, 1980	Defendant's motion to set aside his sentence filed in Kings County Supreme Court.

March 31, 1980	Defendant's application to the New York Court of Appeals for reconsideration of the denial of leave to appeal his conviction.
April 16, 1980	Application for reconsideration denied.
April 28, 1980	Motion to set aside sentence denied by Kings County Supreme Court.
October 3, 1980	Defendant's application for leave to appeal the denial of his motion denied by the Appellate Division of the Supreme Court, Second Department.

Federal Court Proceedings

September 8, 1980	Defendant's second petition for a writ of habeas corpus filed in the United States District Court for the Eastern District of New York.
November 14, 1980	Affidavit of Assistant District Attorney Karen M. Wigle in opposition to petition filed.
November 24, 1980	Defendant's "traverse" to affidavit in opposition filed.
January 30, 1981	Memorandum and Order of the District Court denying defendant's petition filed.
February 10, 1981	Defendant's application for rehearing filed.

March 6, 1981	Defendant's notice of appeal filed.
March 6, 1981	Defendant's application for a certificate of probable cause filed.
April 13, 1981	Memorandum and Order granting a certificate of probable cause filed.
May 30, 1981	Order appointing Sheila Ginsberg Riesel, Esq. as counsel for defendant.
June 29, 1981	Defendant's brief filed in the United States Court of Appeals for the Second Circuit.
June 29, 1981	Joint appendix filed.
July 22, 1981	Motion of Assistant District Attorney Karen M. Wigle for incorporation of documents into appendix.
July 23, 1981	Defendant's affidavit in opposition to motion for incorporation of documents.
July 28, 1981	Order granting motion for incorporation filed.
July 29, 1981	Brief of Assistant District Attorney Karen M. Wigle filed.
August 12, 1981	Defendant's reply brief filed.

September 16, 1981	Oral argument before Oakes, Meskill, CJJ, Blumenfeld, DJ.
November 23, 1981	Reversed and remanded, published signed opinion filed (JLO).
November 23, 1981	Separate dissenting opinion filed (TJM).
December 7, 1981	Petition for rehearing filed.
January 25, 1982	Order denying petition for rehearing filed.
March 11, 1982	Order granting motion to recall and stay mandate filed.

TO BE ARGUED BY
MICHAEL MELINGER
(15 MINUTES)

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK RESPONDENT, —AGAINST— DAVID BARNES, DEFENDANT-APPELLANT	TO BE HEARD ON THE ORIGINAL RECORD KINGS COUNTY IND. # 892/76

SUPPLEMENTARY BRIEF FOR DEFENDANT-APPELLANT

DAVID BARNES
PRO-SE
CO-COUNSEL

MICHAEL MELINGER
ATTORNEY FOR DEFENDANT-APPELLANT
TWO PENN. PLAZA
NEW YORK, NEW YORK 10001
212-279-1371

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[Defendant's statement pursuant to Rule 5531 of the New York Civil Practice Law and Rules is omitted.]

PRELIMINARY STATEMENT

THIS IS AN APPEAL FROM A JUDGEMENT OF THE SUPREME COURT, KINGS COUNTY, RENDERED JANUARY 17, 1977. CONVICTING APPELLANT AFTER A JURY TRIAL OF ROBBERY IN THE FIRST AND SECOND DEGREE (P. L. 160.15, 160.10) AND ASSAULT IN THE SECOND DEGREE (P. L. 120.05) AND SENTENCING HIM AS A SECOND FELONY OFFENDER TO A TERM OF IMPRISONMENT NOT TO EXCEED 7½ TO 15 YEARS FOR EACH ROBBERY COUNT AND A TERM OF 3½ TO 7 YEARS FOR THE ASSAULT COUNT, ALL SENTENCES TO RUN CONCURRENTLY (LENOL, J.)

TIMELY NOTICE OF APPEAL WAS FILED AND ON MARCH 4, 1977. THIS COURT GRANTED LEAVE TO APPEAL AS A POOR PERSON ON THE ORIGINAL RECORD AND TYPEWRITTEN BRIEFS AND ASSIGNED MICHAEL MELINGER AS COUNSEL.

QUESTIONS PRESENTED

1. EVIDENCE ESTABLISHED THAT IDENTIFICATION OF DEFENDANT AT HOSPITAL WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO ERRONEOUS IDENTIFICATION THAT IT VIOLATED DUE PROCESS OF LAW AND THAT SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

2. FAILURE OF ATTORNEY FOR DEFENDANT TO TAKE ALL REASONABLE AND APPROPRIATE MEASURES TO INVESTIGATE THE FACTUAL AND LEGAL DEFENSES AVAILABLE TO HIM AND TO DEVELOPE SUCH DEFENSES AT THE PROPER STAGE OF THE PROCEEDING DENIED DEFNDANT HIS RIGHT TO BE REPRESENTED BY COUNSEL.

3. DISTRICT ATTORNEY'S CROSS-EXAMINATION OF THE DEFENDANT WENT BEYOND, BEYOND THE PERMISSIBLE BOUNDS.

4. COURTS IMPROPER INVASION OF PROVINCE OF JURY WAS IMPROPER IN DETERMINING VERACITY OF WITNESS.

STATEMENT OF FACTS

APPELLANT WAS INDICTED (IND. # 892/76) FOR ONE COUNT OF ROBBERY IN THE FIRST DEGREE, TWO COUNTS OF ROBBERY IN THE SECOND DEGREE, TWO COUNTS OF ASSAULT IN THE SECOND DEGREE AND GRAND LARCENY IN THE THIRD DEGREE. ALL THESE CHARGES AROSE FROM AN ALLEGED FORCIBLE TAKING OF UNITED STATES CURRENCY* AND DURING THE COURSE OF FORCIBLE TAKING OF THE ABOVE MENTIONED CURRENCY, RICHARD BUTTS WAS PHYSICALLY INJURED**

ON OCTOBER 20, 1976. THE DEFENDANT-APPELLANT PROCEEDED WITH THE WADE HEARING, WHICH SUPPRESSION MOTION WAS DENIED (LENOL, J.).

ON OCTOBER 21, 1976. APPELLANT PROCEEDED TO TRIAL BY JURY, THE HONORABLE EDWARD S. LENOL PRESIDING.

THE PEOPLE'S CASE

THE PEOPLE'S CASE CONSISTED OF THE TESTIMONY OF THE COMPLAINANT-WITNESS RICHARD BUTTS AND DETECTIVE HENRY AHEARN, BEARING SHIELD NUMBER 757, ASSIGNED TO THE NEW YORK CITY HOUSING AUTHORITY POLICE DEPARTMENT.

ON MARCH 15, 1976. AT APPROXIMATELY 1:00 P. M. ON THAT DAY (MONDAY) THE COMPLAINANT-WITNESS; RICHARD BUTTS ALLEGELY WAS VISITING A FEMALE'S APARTMENT ON THE 6TH FLOOR. AFTER LEAVING THE APARTMENT, HE RICHARD BUTTS TOOK THE STAIRWELL TO THE MAIN FLOOR, AT THIS TIME TWO MEN APPROACHED HIM, AND ONE OF THE MEN, LATER IDENTI-

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*THE AMOUNT OF MONEY TAKEN WAS $60.00 DOLLARS (RICHARD BUTTS).

**RICHARD BUTTS IS THE NAME GIVEN BY THE WITNESS AT TRIAL. THE NAME ON THE INDICTMENT IS RICHARD BUTTS.

NUMERICAL REFERENCES PRECEDED BY "W" IN PARENTHESIS ARE THE PAGES OF THE WADE HEARING MINUTES, WHICH WILL BE NOTED ON THE FOLLOWING PAGES.

FIED AS DEFENDANT-DAVID BARNES ASKED THE COMPLAINANT-WITNESS WHERE HE COULD GET SOME THINGS FROM (REFERRING TO DRUGS).

THE WITNESS IGNORED HIS ANSWER, AT THIS INSTANCE. TWO MORE MEN APPROACHED, WITNESS, (W-17-18) THEN THE DEFENDANT ASKED HIM AGAIN, WHERE HE COULD GET SOME THINGS FROM, COMPLAINANT-WITNESS STATED THAT HE COULD NOT HELP THEM, HE WAS THEN GRABBED BY ONE OF THE MEN, HIT AGAINST THE HEAD WITH A KNIEF BY THE OTHER MAN, HE WAS GETTING HIT FROM ALL SIDES* AFTER HE GOT UP, THEY TOOK WHAT HE HAD** THE WITNESS THEN STATES THAT HE WENT TO THE HOSPITAL FOR TREATMENT OF HIS EYES, HEAD, AND ALSO THAT HE HAD BEEN STABBED IN THE SIDE.

WHILE IN THE HOSPITAL, AS A RESULT OF HIS INJURIES, WAS UNABLE TO SEE OUT OF HIS LEFT EYE FOR A PERIOD OF FOUR DAYS, WAS FURTHER UNABLE TO SEE OUT OF HIS RIGHT EYE FOR TWO OR THREE DAYS, WHICH MEANS THAT HE WAS NOT ABLE TO SEE FOR AT LEAST TWO DAYS, (HE WAS COMPLETELY BLIND FOR THE TIME MENTIONED), (W-30-31). HE WAS ALSO RECEIVING MEDICATION IN WHICH MADE HIS EYESIGHT RATHER DISTORTED AND BLURRY (W-31-32). THE DEFENDANT-DAVID BARNES WAS APPREHENDED THE NEXT DAY AFTER THIS PARTICULAR INCIDENT AT HIS FATHER'S APARTMENT* BY DETECTIVE-HENRY AHEARN AND HIS PARTNER DETECTIVE MEYERS. THEY BROUGHT THE DEFENDANT TO THE HOUSING AUTHORITY POLICE DEPARTMENT, WHILE ENROUTE TO HOUSING PRECINCT DETECTIVE AHEARN ADVISED HIM OF HIS CONSTITUTIONAL RIGHTS.

THEY THEN BROUGHT THE DEFENDANT TO THE HOSPITAL, WHILE AT THE HOSPITAL, DETECTIVE AHEARN

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*HE SAID THAT HE KNOWS HE WAS HIT A COUPLE OF TIMES BY DAVID BARNES HE SAW HIM THROW A FEW BLOWS AT HIS LEFT EYE (W-18).

**HE STATED THAT MONEY AND A WATCH WAS TAKEN (W-5).

*DET. AHEARN INFORMED THE DEFENDANT THAT HIS PURPOSE WAS PURSUANT TO AN INVESTIGATION THAT HE WAS CONDUCTING (W-51).

WENT INTO THE VICTIM'S ROOM WHILE THE DEFENDANT WAS LEFT HANDCUFFED OUTSIDE WITH DETECTIVE MEYERS.

AHEARN HAD A PERSONAL CONVERSATION WITH BUTTS HE TOLD BUTTS THAT MR. BARNES WAS OUTSIDE AND HE WANTED TO MAKE SURE WHETHER OR NOT THIS IS THE PERSON HE KNOWS AS FROGGY, ONE OF THE MEN WHO HAD ASSAULTED AND ROBBED HIM (W-55-57).

THE DEFENDANT WAS THEN BROUGHT INTO THE HOSPITAL ROOM BY DETECTIVE AHEARN, DETECTIVE AHEARN ASKED THE WITNESS AT THIS TIME; IS THIS THE MAN WHO ROBBED YOU AND ASSAUALT YOU AND THE VICTIM SAID "YES" (W-38-40). THE WITNESS—RICHARD BUTTS WAS WEARING GLASSES ALL OF HIS LIFE SINCE HE COULD REMEMBER (W-12-13). HE STRETCH HIS EYE (RIGHT EYE) AND PUT HIS GLASSES ON IN ORDER TO MAKE IDENTIFICATION. THE DEFENDANT WAS THE ONLY ONE ARRESTED IN THIS CASE AND THEREFORE THE ONLY ONE CONVICTED. IN THE INITIAL POLICE REPORTS THE ONLY DESCRIPTION GIVEN WAS THAT FOUR MALE BLACKS WAS INVOLVED IN THE INCIDENT, (W-46-47), LATER THAT NIGHT APPROXIMATELY 8:00 P.M.* THE DETECTIVE AHEARN VISITED THE COMPLAINANT AT THE HOSPITAL, THE WITNESS, STILL UNABLE TO SEE. THE DETECTIVE WAS INFORMED THAT A PERSON BY THE NAME FROGGY WAS INVOLVED IN THE INCIDENT THERE IS NO DESCRIPTION IN NONE OF THE REPORTS FILED BY OFFICER-HENRY MORGAN PERTAINING TO ANY NAME. ALTHOUGH THE WITNESS STATED HE HAD KNOWN DEFENDANT PRIOR TO THIS PARTICULAR INCIDENT (W-41-47).

REPRESENTATION ACCORDED DEFENDANT

THE DEFENDANT'S ATTORNEY, MR. ROBERT SCHMUKLER OF 121 SCHERHORN STREET, BROOKLYN, NEW YORK 11201. REPRESENTATION OF DEFENDANT WAS

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*8:00 PM WAS THE TIME GIVEN BY DETECTIVE AHEARN, THE WITNESS, RICHARD BUTTS HAD INFORMED HIM THAT A GUY NAMED "FROGGY" WAS INVOLVED (W-42-44)

LACKING IN SUBSTANCE PRIOR TO THE ASSIGNMENT OF MR. SCHMUKLER, THE DEFENDANT HAD TWO PREVIOUS ATTORNEYS WHO WITHDREW FROM THIS PARTICULAR CASE; FIRST, MS. SUSAN KETCHUM, OF COUNSEL 26 COURT STREET, BROOKLYN, NEW YORK 11201. SHE WITHDREW FROM THIS CASE APRIL 28, 1976. THE SAME DAY DEFENDANT WAS INDICTED, SHE SAID THAT THE CASE WAS TOO COMPLICATED. DEFENDANT RETURNED TO COURT ON MAY 7, 1976. AND MR. RICHARD BUSCH 32 PIERREPONT STREET, BROOKLYN, NEW YORK 11201 INFORMED DEFENDANT IN THE BULL PEN, DEFENDANT DID NOT REACH THE COURT ROOM THAT DAY, THAT HE WAS MY ASSIGNED ATTORNEY. THE DEFENDANT RETURNED TO COURT ON MAY 21, 24, AND 25 OF 1976 AND NEVER REACHED THE COURT ROOM NOR DID MR. BUSCH APPEAR IN THE DEFENDANT'S BEHALF AT EITHER TIME. THEN ON THE 28TH DAY OF MAY 1976, MR. BUSCH APPEARED AND DEFENDANT REACHED THE COURT ROOM THAT DAY BUT TO NO AVAIL, MR. BUSCH APPEARED FOR THE PURPOSE OF RELIEVING HIMSELF FROM THE CASE, HIS EXCUSE WAS, HE DID NOT HAVE TRANSPORTATION SO AS OT VISIT DEFENDANT FOR PREPARATION OF HIS CASE, DEFENDANT AT THE TIME WAS BEING DETAINED AT OSSINING CORR. FACILITY, 354 HUNTER STREET, OSSINING, NEW YORK 10562. ON JUNE 14, 1976. MR. ROBERT SCHMUKLER WAS ASSIGNED COUNSEL FOR THE DEFENDANT, DEFENDANT DID NOT REACH THE COURT ROOM BUT HAD A CONFRONTATION WITH MR. SCHMUKLER (VERBAL CONFRONTATION) AT THAT POINT ATTORNEY WAS TRYING TO MAKE A PLEA BARGAIN WITH DEFENDANT. ATTORNEY THEN TRIED TO RELIEVE HIMSELF FROM THE CASE, DEFENDANT WAS LEFT IN THE BULL PENN AT THAT TIME.

THE DEFENDANT NEVER HAD A CHANCE TO RELATE HIS CRITICAL INFORMATION TO MR. SCHMUKLER, MR. SCHMUKLER NEVER VISITED DEFENDANT SINCE HIS ASSIGNMENT, HE WAITED UNTIL THE TRIAL TO SEE DEFENDANT.

THE DEFENDANT HAD AN ALIBI DEFENSE BUT DUE TO ATTORNEY ASSIGNED TO REPRESENT DEFENDANT NEVER VISITED HIM SO AS TO PREPARE HIS DEFENSE FOR TRIAL. THE COURT WAS APPRAISE BY DEFENDANT OF THESE MATTERS OCTOBER 5, 1976. THE RECORD SHOULD REFLECT SUCH

CROSS-EXAMINATION BY PROSECUTOR OF DEFENDANT

THE DEFENDANT TESTIFIED IN HIS BEHALF AT TRIAL AND STEADFASTLY ASSERTED HIS INNOCENTS. THE DEFENDANT HAD A PRIOR CRIMINAL HISTORY, DEFENDANT HAD PREVIOUSLY BEEN CONVICTED OF THE CRIMES OF ROBBERY ON THREE SEPARATE OCCASION, ALSO A DISORDERLY CONDUCT VIOLATION, IN THE LATTER THE DEFENDANT WAS SENTENCE TO A CONDITIONAL DISCHARGE. THE PROSECUTOR'S CROSS-EXAMINATION OF DEFENDANT WITH RESPECT TO COLLATERAL MATTERS, ON THE ROBBERY CHARGE DATED AUGUST 5, 1972. THE DEFENDANT PROCEEDED TO TRIAL ON MARCH 1, 1974. THE DEFENDANT WAS CONVICTED AND HE APPEAL, AT THE TIME OF TRIAL ON THIS INSTANCE CASE THE APPEAL FROM THE JUDGEMENT RENDERED OF CONVICTION MARCH 26, 1974, WAS PENDING IN THIS DEPARTMENT, ALTHOUGH THE APPELLATE DIVISION: SECOND DEPARTMENT HAD NOT RENDERED ITS DECISION. THE DEFENDANT WAS BEING REPRESENTED BY COUNSEL MS. BARBARA B. BUTTER—15 PARK ROW, NEW YORK, NEW YORK 10038.

THE DEFENDANT FURTHER STATES THAT ON THE ASSAULT COUNT HE WAS ACQUITTED, THE PROSECUTOR AFTER THE DEFENDANT STATED THE CASE WAS ON APPEAL, THE PROSECUTOR CONTINUED TO CROSS-EXAMINE THE DEFENDANT ON THE ASSAULT COUNT. THE PROSECUTOR CROSS-EXAMINED THE DEFENDANT CONCERNING THE DETAILS OF ANOTHER CRIME IN WHICH THE TRIAL JUDGE INJECTED HIMSELF MORE THAN NECESSARY—ABOUT THE DETAILS OF THAT CRIME.

THAT PARTICULAR CRIME OCCURRED MAY 4, 1973.

ALSO THE DISTRICT ATTORNEY BROUGHT UP AN UNCHARGED OFFENSE CONCERNING BURGLARY, IN WHICH DEFENDANT WAS NEVER CHARGED WITH. THE DISTRICT ATTORNEY'S CROSS-EXAMINATION OF DEFENDANT WAS OF THE IMPERMISSIBLE NATURE.

COURTS INVASION OF PROVINCE OF JURY

AT THE TRIAL, RATHER DURING THE TRIAL, THE DEFENDANT HAD HIS FATHER CONDUCT AN INVESTIGATION WHICH DISCLOSED EVIDENCE THAT CONTRA-

DICTED THE VICTIM'S TESTIMONY CONCERNING HIM VISITING A FEMALE IN THE BUILDING WHERE THIS ALLEGED OFFENSE OCCURED. AT THE WADE HEARING CONDUCTED OCTOBER 20, 1976, THE EVASIVE ANSWER DREW THE DEFENDANT'S ATTENTION TO THAT ISSUE (SEE PG. 11 OF WADE HEARING) THE EVIDENCE WAS PRESENTED ON THE 26TH OF OCTOBER, WHICH WAS THE EARLIEST DATE POSSIBLE TO SECURE THIS PARTICULAR WITNESS AND DOCUMENTARY PROOF. THE WITNESS NOR THE DOCUMENTARY PROOF WAS ADMITTED IN EVIDENCE ALTHOUGH THE COURT ACCEPTED IT AS A PRO-OFFER.

THE DEFENDANT ASSERTS THAT IF AN INVESTIGATION HAD BEEN CONDUCTED IN HIS CASE, IT WOULD HAD DISCLOSED MORE FAVORABLE EVIDENCE TO THE ACCUSED. AT THE TRIAL THE VICTIM TESTIFIED THAT HE WORKED THE WEEK BEFORE THIS INCIDENT AND HAD RECEIVED A CHECK THAT FRIDAY BEFORE THIS PARTICULAR INCIDENT, AND THAT THE MONEY TAKEN FROM HIS POSSESSION WAS THE PROCEEDS OF THAT CHECK, DEFENDANT HEREBY ASSERTS, HAD AN INVESTIGATION BEEN CONDUCTED IN HIS CASE, EVIDENCE WOULD HAD ESTABLISHED PROOF THAT THE VICTIM'S NEVER WORKED THAT WEEK BEFORE THIS PARTICULAR INCIDENT, NOR WAS THE MONEY THE PROCEEDS OF ANY CHECK.

ARGUMENT

POINT I

EVIDENCE ESTABLISHED THAT IDENTIFICATION OF DEFENDANT AT HOSPITAL WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO ERRONEOUS IDENTIFICATION THAT IT VIOLATED DUE PROCESS OF LAW AND THAT SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

THE PROCEDURE CONDUCTED IN THIS CASE WAS OF A HIGHLY SUGGESTIVE NATURE. THE COURTS HAS CONDEMN THESE TYPES OF PROCEDURES, IN *STOVALL V. DENNO*, SUPRA "SHOWING SUSPECT SINGLY FOR THE

PURPOSE OF IDENTIFICATION AND NOT AS PART OF LINEUP, HAS BEEN WIDELY CONDEMN" IN THIS INSTANCE CASE, THE IDENTIFICATION PROCEDURE WAS SHOCKING TO THE UNIVERSAL SENSE OF JUSTICE OR OFFENSIVE TO THE VERY COMMON AND FUNDAMENTAL IDEAS OF FAIRNESS AND RIGHT.

THE WADE COURT HAS EXCEPTED THE *BIGGERS TEST* TO BE APPLIED TO BOTH PRIOR TO AND AFTER *STOVALL V. DENNO*, 338 U.S. 293.

WHEREIN IT WAS HELD THAT THE DETERMINATION DEPENDS ON THE "TOTALITY OF THE CIRCUMSTANCES" ID., AT 302 THE FACTORS TO BE WEIGHED AGAINST THE CORRUPTIVE AND HARMFUL EFFECT OF THE SUGGESTIVE PROCEDURE IN ASSESSING RELIABILITY ARE SET OUT IN *NEIL V. BIGGERS*, 409 U.S. 188 AND INCLUDE THE WITNESS "DEGREE OF ATTENTION, THE ACCURANCY OF HIS PRIOR DESCRIPTION OF THE CRIMINAL, THE LEVEL OF CERTAINTY DEMONSTRATED AT THE CONFRONTATION, AND THE TIME BETWEEN THE CRIME AND THE CONFRONTATION. ALSO THE BASIC FACTOR OF THE WITNESS'S OPPORTUNITY TO VIEW THE CRIMINAL AT THE TIME OF THE CRIME," SEE: *MANSON V. BRAITHWAITE* — U.S. — (1977).

WEBB V. HAVENER, 549 F.2D 1081 (1977), ALSO SEE *SIMMONS ET AL. V. UNITED STATES*, 390 U.S. 377. IN THE PRESENT CASE THERE WAS NO IMPERATIVE CIRCUMSTANCES TO JUSTIFY THE SHOWING OF THE DEFENDANT TO THE VICTIM OF THIS PARTICULAR CRIME, SO THEREFORE SHOWUP AT HOSPITAL WAS UNWARRANTED.

EVIDENCE ESTABLISHED THAT IDENTIFICATION OF DEFENDANT AT HOSPITAL WAS SO UNNECESSARILY SUGGESTIVE AND CONDUCIVE TO ERRONEOUS IDENTIFICATION THAT IT VIOLATED DUE PROCESS OF LAW. *PEOPLE V. BALLOTT*, 20 N.Y. 2D 600, *PEOPLE V. VELEZ*, 43 A.D. 2D 745, *PEOPLE V. TORO*, 44 A.D. 2D 848, *PEOPLE V. ROBINSON*, 37 A.D. 2D 944, *PEOPLE V. LEBRON*, 46 A.D. 2D 776.

FURTHER THE DETECTIVE SHOULD NOT HAD BEEN PERMITTED TO BOLSTER THE IDENTIFICATION BY STATING THAT THE DEFENDANT FATHER CALLED HIM "FROGGY" THIS WAS NOT COMPETENT UNDER SECTION 393-B OF THE CODE OF CRIMINAL PROCEDURES, NOW

UPDATED BY CRIMINAL PROCEDURE LAW, 60.30, *PEOPLE V. TROWBRIDGE*, 305 N.Y. 471, *PEOPLE V. WILLIAMS*, 3 A.D. 2D 967, AND *PEOPLE V. BURNSIDE*, 52 A.D. 2D 626.

THE INTENTIONAL MANIPULATION BY DETECTIVES AHEARN AND MEYERS WAS USED SOLELY TO CIRCUMVENT THE *KIRBY V. ILLINOIS*, SUPRA, RULE.

TO DEPRIVE ACCUSED OF COUNSEL AND/OR ACCESS TO COUNSEL, INTENTIONALLY DUE TO DELAY IN ARRIAGMENT UNLESS SUCH DELAY IS CAUSE BY EXIGENT CIRCUMSTANCES IF THE DELAY IS CAUSE SOLELY TO DEPRIVE ACCUSED OF COUNSEL, SHOULD BE EXCLUDED FROM EVIDENCE, ANY EVIDENCE THUS OBTAINED CAUSED BY SUCH DELAY, *PEOPLE V. BLAKE*, 35 N.Y. 2D 331.

POINT II

FAILURE OF ATTORNEY FOR DEFENDANT TO TAKE ALL REASONABLE AND APPROPRITE MEASURES TO INVESTIGATE THE FACTUAL AND LEGAL DEFENSE AVAILABLE,—TO HIM AND TO DEVELOPE SUCH DEFENSES AT THE PROPER STAGE OF THE PROCEEDING DENIED DEFENDANT HIS RIGHT TO BE REPRESENTED BY COUNSEL.

THE SIXTH AMENDMENT TO THE FEDERAL CONSTITUTION, AS WELL AS OUR NEW YORK CRIMINAL PROCEDURE LAW, GUARANTEED TO EVERY DEFENDANT THE RIGHT TO BE REPRESENTED BY COUNSEL—AT THE EXPENSE OF THE STATE, IN CASES OF INDIGENCY—IN CRIMINAL PROCEEDINGS *GIDEON V. WAINWRIGHT*, 372 U.S. 335, 83 S. CT. 792, 9 L. ED. 2D 779 (163) C.P.L. 210.15. MOREOVER, OUR COURTS HAVE HELD THAT MERE REPRESENTATION BY COUNSEL DOES NOT, IN AND OF ITSELF, SATISFY THE CONSTITUTIONAL REQUIREMENT WHERE THE REPRESENTATION ACCORDED A DEFENDANT IS COMPLETELY LACKING IN COMPETENCE AND ADEQUECY, SUCH REPRESENTATION DOES NOT MEET THE CONSTITUTIONAL STANDARD, *PEOPLE V. TOMASELLI*, 7 N.Y. 2D 350, 197 N. Y.S. 2D 697 (1960) WHILE THE STATE CANNOT PERFORM THE IMPOSSIBLE ON THE

DEFENDANT'S BEHALF—THAT IS, PROVIDE HIM WITH ERRONEOUS COUNSEL.

THE COURT OF APPEALS HAS MADE IT PLAIN, IN TWO RECENT CASES, THAT THE RIGHT TO COUNSEL IS BY NO MEANS A RIGHT LACKING IN SUBSTANCE. *PEOPLE V. BENNETT*, 29 N.Y. 2D 462, 329 N.Y.S. 2D 801 (1972).

THUS IN *PEOPLE V. BENNETT*, 29 N.Y. 2D 462, 329 N.Y.S. 2D 801 (1972), THE COURT REVERSED A CONVICTION FOR ROBBERY ON THE GROUND THAT DEFENSE COUNSEL HAD FAILED ADEQUATELY TO INVESTIGATE AND PREPARE A DEFENSE OF INSANITY, THERE THE COURT STATED: *"IT IS IMPOSSIBLE TO DEFINE WITH ANY PRECISION WHAT CONSTITUTES* "INADQUATE" OR INEFFECTIVE" LEGAL REPRESENTATION OR TO FORMULATE STANDARDS WHICH WILL APPLY TO ALL CASES. BUT, AT THE VERY LEAST, THE RIGHT OF A DEFENDANT TO BE REPRESENTED BY AN ATTORNEY MEANS MORE THAN JUST HAVING A PERSON WITH A LAW DEGREE NOMINALLY REPRESENT HIM UPON A TRIAL AND ASK QUESTIONS . . . THE DEFENDANT RIGHT TO REPRESENTATION DOES ENTITLE HIM TO HAVE COUNSEL CONDUCT APPROPRIATE INVESTIGATIONS BOTH FACTUAL AND LEGAL TO DETERMINE IF MATTERS OF DEFENSE CAN DEVELOPED AND TO ALLOW HIMSELF ENOUGH TIME FOR REFLECTION AND *PREPARATION FOR TRIAL. ID. AT 446, 329, N.Y.S. 2D AT 804.*" SIMILARLY, IN *PEOPLE V. LEBREE*, 34 N.Y. 2D 257, 357 N.Y.S. 2D 412. THE COURT OF APPEALS OVERTURNED A CONVICTION OF MANSLAUGHTER, ADOPTING THE LANGUAGE OF BENNETT, QUOTED ABOVE AND OBSERVING FURTHER WE DO NOT IMPLY THAT ERROLESS COUNSEL IS REQUIRED BY THE SIXTH AMENDMENT, BUT, MINIMALLY, THE ASSISTANCE OF COUNSEL MUST IN FACT BE SUSCEPTIBLE OF BEING DEEMED OF AN ASSISTIVE NATURE" ID AT 260, 261, 357 N.Y.S. 2D AT 412.

THE APPELLANT DIVISION: SECOND DEPARTMENT, SIMILARLY CONCERNED WITH FILLING IN THE CONTOURS OF THE RIGHT TO COUNSEL, LINKED THE RIGHT TO COUNSEL TO THE DEFENDANT'S RIGHT TO A FAIR TRIAL, REVERSING A MANSLAUGHTER CONVICTION UPON A FINDING. "UNDER THE CIRCUMSTANCES AT

BAR IT CANNOT BE SAID BEYOND A REASONABLE DOUBT THAT SUCH REPRESENTATION (BY DEFENSE COUNSEL) DID NOT MAKE OR COULD NOT HAVE MADE THE DIFFERENCE BETWEEN THE GUILTY VERDICT AND AN ACQUITTAL" *PEOPLE V. RAMIREZ*, 45 A.D. 2D 729, 356 N.Y.S. 2D 356 (2D DEPT. 1974).

WHILE NEITHER THE COURT OF APPEALS NOR OUR OWN APPELLATE DIVISION HAS SEEN FIT TO ESTABLISH AN EXPLICIT STANDARD AGAINST WHICH TO MEASURE THE EQUALITY, (AND QUALITY) OF REPRESENTATION ACCORDED A DEFENDANT, FOREGOING CASES SUGGEST THE PARAMETERS OF THE RIGHT TO COUNSEL ENCOMPASSES HIS RIGHT TO HAVE ATTORNEY, SPECIFICALLY HIS ATTORNEY TAKE ALL REASONABLE AND APPROPRITE MEASURES TO INVESTIGATE THE FACTUAL AND LEGAL DEFENSES AVAILABLE TO HIM AND TO DEVELOPE SUCH DEFENSES AT THE PROPER STAGE OF THE PROCEEDING.

WHERE DEFENDANT'S ATTORNEY HAS FAILED EITHER TO INVESTIGATE OR TO DEVELOPE AVAILABLE DEFENSES, AND DEFENDANT HAS BEEN CONVICTED, SUCH CONVICTION MUST BE REVERSED UNLESS IT APPEARS BEYOND A REASONABLE DOUBT, FROM THE RECORD THAT THE DEFENDANT WOULD HAVE BEEN CONVICTED EVEN HAD HIS ATTORNEY'S FAILURE NOT OCCURED. IF THE LOGIC OF THE *BENNETT, LEBREE,* AND *RAMIREZ* CASES IS APPLIED TO THE DEFENDANT-APPELLANT SITUATION, THE CONCLUSION MUST FOLLOW THAT THE REPRESENTATION ACCORDED APPELLANT WAS SO LACKING IN COMPETENCE AND EFFECTIVENESS AS TO DEPRIVE HIM OF HIS CONSTITUTIONALLY GUARANTEED RIGHT TO COUNSEL. THERE WAS NEITHER A ATTORNEY-CLIENT RELATIONSHIP DEVELOPED BEFORE THE TRIAL.

POINT III

DISTRICT ATTORNEY'S CROSS-EXAMINATION OF THE DEFENDANT WENT BEYOND THE PERMISSIBLE BOUNDS.

CROSS-EXAMINATION OF DEFENDANT ABOUT AN OFFENSE IN WHICH THE DEFENDANT HAD BEEN AC-

QUITTED WAS PREJUDICIAL AND THEREFORE ERROR, *PEOPLE V. SANTIAGO*, 15 N.Y. 2D 640, *PEOPLE V. CASCONE*, 185 N.Y. 317, 334, 78 N.E. 287, 292. WHILE CASE, WHICH DISTRICT ATTORNEY CROSS EXAMINE DEFENDANT WAS AN APPEAL AND DEFENDANT HAD ALREADY BEEN ASSIGNED COUNSEL—THE GENERAL RULE IS THAT CROSS-EXAMINER CANNOT CONTRADICT A WITNESS'S ANSWERS CONCERNING COLLATERAL MATTERS BY PRODUCING EXTRINSIC EVIDENCE FOR THE SOLE PURPOSE OF IMPEACHING CREDIBILITY.

IT FOLLOWS THAT A FACT IS NOT A COLLATERAL MATTER IF IT COULD BE SHOWN IN EVIDENCE FOR ANY PURPOSE INDEPENDENT OF THE CONTRADICTION: THE ANSWER THAT THE CASE WAS ON APPEAL BOUND THE DISTRICT ATTORNEY'S, I.E. MERITS FROM FURTHER INQUIRY.

DEFENDANT DID NOT RECEIVE A FAIR TRIAL WHEN CROSS EXAMINATION OF HIM WENT BEYOND THE PERMISSIBLE BOUNDS IN SEEKING DETAILS OF HIS PRIOR CONVICTIONS, AND TRIAL JUSTICE INJECTED HIMSELF IN TRIAL MORE THAN NECESSARY TO, CLARIFY DETAILS OF EVIDENCE DURING CROSS-EXAMINATION, OF DEFENDANT. *PEOPLE V. JACOBS*, 45 A.D. 2D 675, *PEOPLE V. MENDES*, 3 N.Y. 2D 120, 164 N.Y.S. 2D 401. CROSS-EXAMINATION CONCERNING UNCHARGE CRIME WAS, PREJUDICIAL. *PEOPLE V. MC KINNEY*, 24 N.Y. 2D 180, *PEOPLE V. CAPRIO*, 364 N.Y.S. 2D 588, *PEOPLE V. PEEN*, 365 N.Y.S. 2D 867.

PRIOR TO TRIAL THE DEFENDANT MADE A SANDOVAL MOTION WHICH THE COURT DENIED.

POINT IV

COURTS IMPROPER INVASION OF JURY WAS IMPROPER IN DETERMINING VARACITY OF WITNESS.

THE COMPLAINTANT-WITNESS RICHARD BUTTS GAVE TESTIMONI THAT HE WAS LEAVING A FEMALE'S APARTMENT IN THE SAME BUILDING WHERE THE ALLEGED CRIMES OCCURED, WAS A LIE, THE COURT SHOULD HAD HELD A VOID DIRE HEARING IN ORDER TO DETERMINE THE VARACITY OF THE COMPLAINANT-WITNESS. THE

COURT BY DOING THIS INVADED THE PROVINCE OF THE JURY.

THIS THE COURT HAD NO JURIDICTION TO DO, *GRIGLIO V. UNITED STATES*, 405 U.S. 150, *PEOPLE V. SAVVIDES*, 1 N.Y. 2D 554. IN THE RECORD YOU WILL SEE WHERE THE DETECTIVE AHEARN STATED THAT WHEN HE ENTERED MY FATHER'S APARTMENT, THAT MY FATHER CALLED ME "FROGGY" THE COPS WANT TO SEE YOU.

THIS PART OF THE DETECTIVE'S TESTIMONY WAS FALSE, AND PROOF WAS OFFERED BY MY TRIAL COUNSELOR, AND THE COURT OVER-RULED IT, SUPPRESSION OF FAVORABLE EVIDENCE UPON REQUEST IS A DENIAL OF DUE PROCESS OF LAW CONST. 14TH AMEND. *BRADY V. MARYLAND*, SUPRA.

CONCLUSION

FOR THE REASONS SET FORTH IN ALL POINTS APPELLANT'S JUDGEMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED OR, ALTERNATIVELY, A NEW TRIAL ORDERED.

RESPECTFULLY SUMBITTED,

/S/ DAVID BARNES
DAVID BARNES
CO-COUNSEL
PRO-SE

MICHAEL MELINGER
ATTORNEY FOR DEFENDANT-APPELLANT

[Notarized on September 6, 1977.]

At a Term of the Appellate Division of the Supreme Court of the State of New York, Second Judicial Department, held in Kings County on June 24, 1977

HON. FRANK A. GULOTTA, *Presiding Justice*
HON. JAMES D. HOPKINS)
HON. M. HENRY MARTUSCELLO) *Associate Justices*
HON. HENRY J. LATHAM)

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent*, —*v.*— DAVID BARNES, *Appellant.* (K)	Decision and Order— Court's Motion to Relieve Counsel of Assignment and to Assign New Counsel Ind. # 892-76

In the above-entitled action, the above-named appellant having appealed to this court from a judgment of the Supreme Court, Kings County, rendered January 17, 1977 and an order having been made by this court on March 4, 1977 granting appellant's motion to dispense with printing and to assign counsel (assigning Barry Gene Rhodes, Esq. of 16 Court Street, Suite 1210, Brooklyn, N.Y. 11241).

On the court's own motion, it is

ORDERED that the assigned counsel is relieved of the assignment and he is directed to turn over all papers in the action to new counsel herein assigned.

Pursuant to statute (County Law, § 722), the following named attorney is assigned as counsel to prosecute the appeal:

Michael W. Melinger, 2 Penn Plaza, New York, N.Y. 10001.

Appellant's time to perfect the appeal is enlarged. Assigned counsel shall prosecute the appeal expeditiously in accordance with this court's rules (22A NYCRR 670.1 *et seq.*) and written directions.

Enter.

IRVING N. SELKIN
Clerk of the Appellate Division
DATE: 6/24/77 NO. 204 Rel.C.

Defendant's address:
77A 663
Box 51, Comstock, NY 12821

GELLIS & MELINGER
ATTORNEYS AT LAW
Two Pennsylvania Plaza
New York, N.Y. 10001

JAN IRA GELLIS
MICHAEL W. MELINGER

Telephone
(212) 279-1371

November 9, 1977

Mr. David Barnes 77A663
Box 51
Great Meadows Correctional Facility
Comstock, New York 12821

Re: Kings Indictment 892/76

Dear Mr. Barnes:

I am in receipt of your letter of November 7, 1977. I am currently in the process of framing the points of law in your case that I believe are appealable. You will find them listed below. Please respond with your reflections and suggestions in reference to them. Once I hear from you, I will prepare the brief.

First of all however, you mentioned in your last communication that you are missing parts of the trial transcript. Please identify those parts so that I might furnish you with them.

Additionally, you requested copies of the hospital reports that were admitted into evidence as People's Exhibit No. 2. Those would be expensive to reproduce and their evidentiary value was only to corroborate testimony of Butts' injury, not how it occurred, when it occurred and by whom it was inflicted. Since he obviously sustained some kind of injuries, and since you did not contest that fact at trial, I do not think that they would have any value on appeal.

You also requested the judge's conclusions of law at the Wade hearing. You will find, on the bottom of page 63 and the top of page 64 of the Wade hearing transcripts, that the judge found, as a matter of law that the "identification made by the complaining witness was made as

a result of his knowledge of defendant for a period of four or five years before this incident." Because of this, the judge did not rule on the question of a suggestive or illegal show-up and consequentially, on the question of a tainted identification.

Due to this determination by the court at the conclusion of the Wade hearing, we cannot use the show up as a basis for a tainted identification. What I will do however, is argue that the facts adduced at the hearing, i.e. Butts' prior acquaintance with you, does not substantiate the court's determination of an independent identification based on his prior knowledge of you. I will also argue against the introduction of the police officer's corroborative identification testimony at trial.

As I advised you in a prior communication with you, facts readily available to you or your attorney at the time of trial and not presented by trial counsel at trial, or even facts that were presented by trial counsel, are not bases for appeal. The facts were, or should have been put in evidence at trial and argued on summation. New facts, or new factual arguments, that existed and were readily determinable at the time of trial, are not of assistance to us at this time. Among your suggestions and arguments that fall under this category are:

(a) that Butts never visited the young lady;

(b) that Butts was not admitted to the hospital until 4 o'clock;

(c) that the little boy (Eliza) that Butts said helped him to the hospital was in school at 1 o'clock on March 15;

(d) that hospitals usually voucher glasses;

(e) that Butts never stretched his eye when he looked at you in the hospital;

(f) that your father never called you "Froggy";

(g) that Butts didn't work the week before the trial;

(h) that your trial attorney ineffectively represented you.

However, despite the above, I think that we still have a number of appealable issues:

(1) The facts do not support the judge's determination at the conclusion of the Wade hearing that the complaining witness had an independent knowledge and acquaintance of you.

(2) The denial by the court of the introduction of medical and/or psychiatric testimony concerning the complaining witness was improper. (Trial pp. 58-59)

(3) The court improperly took over the cross-examination of you. (Trial p. 122)

(4) The court improperly allowed the identification testimony of the arresting officer in violation of Criminal Procedure Law § 60.30.

(5) The trial court improperly had made an opinion and expressed it during the course of the proceedings. (Trial pp. 126-127)

(6) The summation of the prosecutor was improper in that it exceded permissible bounds.

(7) The court improperly denied the defenses request to charge.

I have read your supplementary brief. I do not necessarily agree with the points that you raised and that you addressed yourself to, since I do not think that they are supportable by the record. Your supplementary brief will, however, hopefully be submitted for the consideration by the Appellate Division.

As I stated above, upon my receipt of your response, I will commence drafting our brief.

I am looking forward to hearing from you shortly.

Very truly yours,
/s/ Michael W. Melinger
Michael W. Melinger

MWM:mlh

To be argued by
MICHAEL W. MELINGER
(10 min.)

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
—against—
DAVID BARNES,
Defendant-Appellant.

Heard on the
Original Record
County of Kings
Ind. # 892/76

BRIEF FOR DEFENDANT-APPELLANT

MICHAEL W. MELINGER
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(212) 564-6530

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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

PEOPLE OF THE STATE OF NEW YORK,
Respondent

v

DAVID BARNES,
Defendant-Appellant.

Statement Pursuant to Rule 5531

1. The indictment number in the Court below was 892/76.
2. The full names of the original parties were PEOPLE OF THE STATE OF NEW YORK against DAVID BARNES. There has been no change of parties on this appeal.
3. This action was commenced in Supreme Court, Kings County.
4. This action was commenced by the filing of an indictment.
5. This appeal is from a judgment convicting appellant after trial of the crimes of robbery in the first and second degree (Penal Law §§ 160.15, 160.10) and assault in the second degree (P.L. § 120.05).
6. This is an appeal from the judgment of conviction rendered January 17, 1977 (Lentol, E.S., J.)
7. Appellant has been granted permission to appeal as a poor person on the original record: The appendix method is not being used.

Preliminary Statement

This is an appeal from a judgment of the Supreme Court, Kings County, rendered January 17, 1977, convicting appellant after trial of the crimes of robbery in the first degree (P.L. $ 160.15), robbery in the second degree (P.L. § 160.10) and assault in the second degree (P.L. § 120.05) and imposing concurrent sentences of 7½ to 15 years on the two robbery convictions and a concurrent 3½ to 7 year term on the assault conviction (Lentol, E.S., J. at Wade hearing, trial and sentencing).

Timely notice of appeal from the judgment was filed and on March 4, 1977 this court granted appellant leave to appeal as a poor person on the original record and typewritten briefs and assigned Barry G. Rhodes, Esq., as counsel on appeal. On June 24, 1977, this court assigned Michael W. Melinger, Esq., as counsel on this appeal and relieved appellant's prior new appointed counsel from his assignment.

Appellant is now incarcerated pursuant to the judgment appealed herein and no application has been made for a stay pending determination of the appeal.

Questions Presented

1. Whether the exclusion of evidence relating to the psychiatric history of complaining witness was proper.

2. Whether the court erred in its ruling at the conclusion of the Wade hearing in that it did not, nor could it, find as a matter of law, that the complaining witness was able to identify the defendant at the trial based solely on his prior knowledge of the defendant and on his observations of the suspect during the alleged incident.

3. Whether the court improperly substituted itself in the place of the district attorney by cross-examining defendant and thereby denied defendant a fair and impartial trial.

Statement of Facts

Kings County Indictment Number 892 of 1976 charged appellant with robbery in the first degree, robbery in the second degree (two counts), assault in the second degree (two counts) and grand larceny in the third degree based on a robbery and assault of Richard Butts on March 15, 1976.

After his motion to suppress the identification by the complaining witness had been denied, appellant went to trial before the Honorable Edward S. Lentol and a jury.

The Wade Hearing

The appellant claimed that the in-court identification of him would be tainted in that he was the victim of an illegal show-up. The Court refused to determine the propriety of the show-up and found, as a matter of law, that the identification made by the complaining witness was made independently as a result of his knowledge of the defendant for a period of years (W:63-64) *. The Court then stated that the show-up was made in the worst possible way, but that the Court did not have to reach the propriety of that question (W:64-65).

The Trial

Richard Butts, the complaining witness, was coming from a friend's house during the afternoon of March 15, 1976 (T:20). He did not know his friend's last name

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* Numerical references preceded by "W" are pages of the Wade hearing minutes. Numerical references preceded by "T" are pages of the trial transcript.

(T:21). It was stipulated by the attorneys that this friend's school records would indicate that she was in school on March 15, 1976 (T:95).

Butts stated that at this time he had known the appellant from living in the projects and from Junior High School (T:24-25) and that he didn't see appellant very frequently (T:37). In fact, the complaining witness had been living in New Jersey from the end of 1973 through March of 1975 (T:39). During that period he came to New York every other weekend and had not seen David Barnes then (T:39). He had however, seen the appellant two or three times during the month preceeding the incident (T:40).

The appellant never saw the complaining witness at any time other than in Court and didn't go to Junior High School at a time simultaneous to the complaining witness' attendance (T:97). In fact, during the four years prior to the incident, appellant had spent three years in prison (T:98).

On March 15, 1976, Butts was approached by four men. One he claimed to recognize as the appellant. He was then beaten by them, during which property was taken from his person (T:25-31).* Butts did not know which of his assailants did what acts during the incident (T:44-51).

Butts wore glasses at the time of the incident. He testified at trial that he took them off during its course (T:54). However, at the Wade hearing he testified that they were knocked off his face when he was first attacked (W:15).

Appellant's trial attorney attempted to inquire whether or not the complaining witness had ever had any psychia-

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* It should be noted that neither the theft nor the injuries sustained by the complaining witness are in issue.

tric treatment (T:58). The court however ruled questioning of that nature to be improper (T:59).

Detective Ahearn, the arresting officer, testified that he conducted the investigation of the incident and, as a result thereof, arrested the appellant (T:70-77). He further testified that appellant's father, called appellant by the name "Froggy" (T:76), the same name the complaining witness used to identify his assailant (T:25).

The appellant testified in his own defense. He testified that he was at home during the time of the incident (T: 98) and he denied committing the acts of which he was accused (T:101). On the cross-examination of the appellant, prior convictions were questioned (T:101-113). Appellant further testified as to his whereabouts at the time of the incident and his employment (T:113-122). Upon appellant's testimony involving a "welfare check", the Court took over the questioning of the appellant (T:122).

The Verdict and Sentence

The jury found appellant guilty on one count of robbery in the first degree, one count of robbery in the second degree and one count of assault in the third degree. On January 17, 1977, appellant was adjudicated a second felony offender and was sentenced to concurrent terms of 7½-15 years on the two robbery convictions and to a concurrent term of 3½-7 years on the assault conviction (sentence minutes at 6, 8-9).

ARGUMENT

POINT I

The Court Cannot Bar Evidence Of The Psychiatric History Of The Sole Accusing And Complaining Witness

Upon a question by the defendant's attorney addressed to the complaining witness relating to whether or not the

complaining witness had ever "had any kind of psychiatric treatment" (T:58) the court objected. Despite an offer of proof by the defendant (T:58) the court did not allow testimony concerning the witness' psychiatric history.

Defendant acknowledges that questioning at trial in reference to a witness' psychiatric history, with its inherent implications with respect to mental condition, is subject to the discretion of the court, if sought to bear on the question of *competency* of the witness to testify (*People v Rensing*, 14 N.Y. 2d 210, 250 N.Y.S. 2d 401, 199 N.E. 2d 489 (1946)). However, on the issue of *credibility* such questioning is proper.

> "Once a witness has testified, evidence as to his mental condition may be introduced for the purpose of impeaching his credibility." *People v Souvenir* 83 Misc. 2d 1038, 373 N.Y.S. 2d 824, 826 (Crim. Ct., New York Co., 1975).
>
> "the weight to be given to an honest witness' testimony depends on his capacity to perceive, to recall and to narrate accurately. Any defect which substantially affects the witness' capacity, may, therefore, be shown to affect his credibility. . . ." (Prince, Richardson on Evidence 519 (9th ed. 1964).

The court, in sustaining its own objection to a question concerning the psychiatric history of the complaining witness, precluded the defendant from adducing evidence that would have affected the complaining witness' credibility.

There is no question that evidence bearing on a witness' credibility is a proper subject for cross examination of that witness. (*Ellarson v Ellarson*, 198 App. Div. 103, 190 N.Y.S. 6 (Third Dept. 1921).

POINT II

By Barring Evidence Of The Psychiatric History Of A Witness The Court Improperly Removed The Question Of Credibility From The Province Of The Jury.

It is the clear law of this state that the question credibility is one for the jury to determine (*People v Parks*, 41 N.Y. 2d 36, 390 N.Y.S. 2d 848, 359 N.E. 2d 358 (1976); *People v Reed*, 40 N.Y. 2d 204, 386 N.Y.S. 2d 371, 352 N.E. 2d 558 (1976); *People v Regina*, 19 N.Y. 2d 65, 277 N.Y.S. 2d 683, 224 N.E. 2d 108 (1966); *People v Williams*, 6 N.Y. 2d 18, 187 N.Y.S. 2d 750, 159 N.E. 2d 549, certiorari denied 361 U.S. 920, 80 S. Ct. 266, L. Ed. 2d 188 (1959)).

In the instant matter, it is especially important that the trier of fact be provided with as much evidence as possible in order to make an informed judgment of the credibility of the complaining witness.

The complainant was the only witness for the People that gave testimony concerning the actual incident. Close scrutiny should therefore be given to his credibility. The serious nature of the crime charged underscores the necessity of a well-informed jury.

Furthermore, other evidence adduced at trial (such as inconsistent testimony concerning whether or not the complaining witness and defendant were acquainted; conflicting evidence concerning the whereabouts of the complaining witness immediately prior to the alleged incident and who, if anyone, he was with; the visual acuity of the complaining witness with and without his glasses at the time of the alleged incident) placed the credibility of the complaining witness in issue. The defendant should not be precluded from providing additional evidence for the consideration of the jury.

The exclusion by the court of questions relating to the possibility of the complaining witness having a psychiatric history unduly prejudiced the defendant. In a case such as this, where essentially the proof rests only on the testimony of the complaining witness and the defendant, the credibility of each of these witness is a decisive factor. If a jury is denied evidence that might materially alter its perception of credibility, then its decision should not stand.

It is submitted, that based on the foregoing, and upon an offer of proof by the defendant (T:58), the court's exclusion of the psychiatric history of the sole complaining witness amounted to reversible error.

POINT III

As A Matter Of Law, The Court Erred In Finding "That The Identification Made By The Complaining Witness Was Made Independently As A Result Of His Knowledge of the Defendant. . . ." W:63-64)

The Court at the Wade hearing found "as a matter of law, that the identification made by the complaining witness was made independently as a result of his knowledge of the defendant for a period of four or five years before this incident. And this identification was independently arrived at (W:63-64)". The Court made this determination upon finding that the complaining witness went to school with defendant and had seen him around socially (W:65).

The Court did not state whether or not it had found that the complaining witness had an adequate opportunity to view the suspect at the time of the incident. Furthermore it refused to decide whether a show up identification held 24 hours after the alleged incident tainted the in-Court identification. The Court stated, however, that

if the show up identification "were standing alone, [it] would probably grant your [defendant's] motion because it's the worst possible way of having a showup made (W:64)."

Defendant submits that, as a matter of law, the proof in support of the Court's finding is not clear and convincing.

The only evidence before the Court, at the Wade hearing, indicating a prior knowledge of the defendant by the complaining witness are statements made by the complaining witness that he knew the defendant;

1. For five or six years prior to March 15, 1976 (W: 5, 13, 36);
2. From years of acquaintance in the projects (W:4).
3. From school and living around the area (W:5).

That is the entirety of the testimony upon which the Court's aforementioned determination is expressly based.*

Of necessity, the Court should have also considered whether the complaining witness had an opportunity to view the suspect at the time of the alleged incident. The testimony concerning the identification shows that at the time of the incident the lighting was rather dim (W:6); that the complaining witness had worn glasses all his life (W:12); that the complaining witness was wearing glasses and the commencement of the incident (W:12); that his glasses were knocked off or [illegible] when he was first attacked (W:15, 35); and, that during the attack he sustained injuries to his eyes (W:18

---

* There is also testimony that the complaining witness knew the suspect as "Froggy". There is no testimony however, indicating how well complainant knew the person known as "Froggy".

The People must show by clear and convincing evidence that the in court identification had an independent basis and would not, therefore, be tainted. (*People v Ballott*, 20 N.Y. 2d 600, 286 N.Y.S. 2d 1, 233 N.E. 2d 103 (1968); *People v Burrows*, 53 A.D. 2d 1038, 386, N.Y.S.2d 157 (Fourth Dept.; 1976); *People v Gray*, 47 A.D.2d 674, 363 N.Y.S.2d 1968 (Third Dept.; 1975), *People v Lebron*, 46 A.D.2d 776, 360 N.Y.S. 2d 468 (Second Dept.; 1974).

The Court, as a matter of law, could not have found by clear and convincing evidence that the in-court identification was not tainted by the showup. Defendant bases this assertion on the paucity of evidence showing a prior acquaintance between the two and upon the questionable opportunity that the complaining witness had during the incident to view his assailant. The Court in refusing to rule on the propriety of the showup was then bound by the "clear and convincing" standard. That is, the Court must have clearly and convincingly found that the in court identification was based on the complaining witness' observation of the suspect other than at the showup identification (*United States v Wade*, 338 U.S. 218, 87 S. Ct. 1926, 18 L. Ed. 2d 1149 (1966); *People v Ballott, supra*). The defendant submits that as a matter of law, this has not been shown.

POINT IV

Whether The Court's Cross-Examination Of The Defendant Improperly Denied Defendant Of A Fair And Impartial Trial.

During the cross-examination of the defendant by the assistant district attorney, the defendant stated that he had left his house at 3:00 P.M. to pick up the welfare check. The following question ensured (T:22):

"THE COURT: You mean you're collecting welfare?

THE WITNESS: Yes.

THE COURT: While you were working off the books?

THE WITNESS: Yes.

THE COURT: Go ahead. Do you have any more questions, Mr. Silverman (the Assistant District Attorney)"?

Defendant submits that this cross-examination by the court, and its implicit allegation of wrong-doing in front of the jury, improperly denied defendant of a fair and impartial trial.

While it is proper for a trial judge to examine witnesses where such "questioning is necessary to elicit significant facts to clarify or enlighten an issue or merely to facilitate an orderly or expeditious trial" (*People v Mendes*, 3 N.Y. 2d, 120, 121, 164 N.Y.S.2d 401, 402, 143 N.E.2d 806, 807 (1957), it should be aware of the "ever present and serious threat that a jury's determination may be influenced by what it interprets to be the court's own opinion. . . ." *(People v Mendes, supra)*

The display by the Trial Court of patent antaganism towards the defendant (*People v Ramsey*, 40 A.D.2d 837, 337 N.Y.S. 2d 332 (Second Dept. 1972), or his asking questions in such a way as to disclose his opinion of the credibility of defendant (*People v Kachadourian*, 116 N.Y.S. 2d 486 (Broome Co. 1957)) deprives a defendant of a fair jury trial.

Defendant submits that, by virtue of the above quoted questioning, the Trial Court improperly interjected itself into the examination, that such questions served no valid purpose, and that the jury was thereby able to perceive

a bias of the Trial Court against the defendant. The defendant therefore was deprived of a fair and impartial trial.

CONCLUSION

For The Reasons Stated Above Appellant's Convictions Must Be Reversed And The Indictment Dismissed, Or Alternatively, A New Trial Ordered.

Respectfully submitted,
MICHAEL W. MELINGER
Attorney for Defendant-Appellant

Dated: February, 1978

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,* —*against*— DAVID BARNES, *Defendant-Appellant.*	Supplementary Brief for Defendant-Appellant Heard on the Original Record County of Kings Ind. # 892/76

SIR:

PLEASE TAKE NOTICE: I David Barnes is fully aware of the facts and circumstances surrounding this case; an makes this Supplementary brief in support of defendant's Attorney Mr. Michael W. Melinger, brief for defendant. The full names of the original parties were PEOPLE OF THE STATE OF NEW YORK Against DAVID BARNES. There has been on change of parties on this Appeal. This action was commenced in Supreme Court, Kings County. This action commenced by the filing of an indictment. This appeal is from a judgment convicting appellant after Trial of the crimes of Robbery in the first and second degree (Penal Law § 160.15,160.10) and assault in the second degree (P.L. § 120.05). This is an appeal from the judgment of conviction rendered January 17, 1977 (Lentol, E.S., J) and imposing concurrent sentences of 7½ to 15 years on the two robbery convictions and a concurrent 3½ to 7 year term on the assault conviction (Lentol, E.S., J at Wade hearing, Trial and sentencing.

1. The Court erred in failing to charge as defense counsel requested, that acts committed by alleged co-defendant should not be binding on defendant.
2. The court should not have aired it personal opinion in such a manner that would mandate him as bias towards defendant.
3. The summation of the prosecutor was improper in that it exceded permissible bounds.

Facts and Argument

1). There was a reasonable view of the record that would indicate according to the complaining witness Richard Butts that the defendant's intent was to "obtain some kind of drug." At the wade hearing and Trial the complaining witness testified that two other "guys" approached him. The inference can be drawn that the defendant's actions was only to assault him; in light of defendant's later conduct. While the other's intended to rob him. (w-17 and Tr. 44-51) In people v Labelle, 18N.Y.2d 405 at 276N.Y.S.2d 412 states: Section 2 of the Penal Law make a principal in the crime charge any person who "aids and abets in it's commission." It does not, however, make one a principal on the mere basis that in retrospect, we may say that in an objective sense this person was helpful or of use to the actual perpetrator of the crime. There is a subjective, element as well. As one legal scholar has pointed out "an aider and abettor must share the intent or purpose of the principal actor, and there can be no partnership in an act where there is no community of purpose. People v Weiss, 290 N.Y. 160, 48 N.E. 306. The court erred in failing and/or refusing to charge as defense counsel requested. (Tr. 188) Pursuant to section 300.10 Subd.3 of the C.P.L. the court must charge upon request from defense that the Jury could render a verdict separately as to each defendant. People v McDuffie, 56 A.D.2d 662 at 391 NYS.2d 911, also see People v Gwynn, 53A.D. 565 (1976).

2). The Trial court improperly had made an opinion and expressed it during the course of the proceding. (Tr. Pp 126-127) Absence of a jury does not afford a trial judge a license to air his personal feelings on case or to comment as to character of a defendant. Such name calling as to defendant as masochist was highly improper. People v Gardner,—A.D.—, 399N.Y.S.2d 146.

3). Where prosecutor stated in his summation "does defendant has an interest in the outcome of this case, and is he more apt to lie than Butts? You better believe it, you better believe it, you better believe it! He has a whole lot riding on this trial, as you well know it (Tr. 159), and that I would geniunely—it's obvious to you, without raising my voice, that on March 16th, he as a thief, he was a cheat, he was stealing. I think you all know that you cannn't work and collect welfare benefits, that's against the Law. You think he was any less a thief on March 15th, than he was on March 16th? He Made Himself out to be what he is, a thief liar, and a cheat". (Tr. 160) And you are probably sitting there, thinking to yourselfes, well, it's easy for Silverman to say. But we'er not D.A.'s, well in any event, use your everyday common sense, experience, and if you evalute the witness that you heard and you evalute this man, what he is, you don't have to be a College Professor, You don't have to be a Judge, you don't have to be a District Attorney.

But you can come to only one conclusion, that he beat the hell out of Butts and took his money and was guilty of Robbery and all the other *CRIMES*"! (Tr. 161) In People v McKinney, 24 N.Y.2d 180, that court noted: Evidence of uncharge crimes and offenses is inadmissible if offered for no purpose other than to raise inference *** that defendant is a crimin. or of criminal disposition and therefore likey to have committed crime charged, but it is admissible if directly probative of crime charge.

In People v Mcnair, 368 N.Y.S.2d 567, 48 A.D.2d 860, *Credibility and Character of Witnesses*: Prosecutor improperly supported his own case by his own veracity and official position when he stated on summation, that he didn't believe defendant's story that defendant stabbed victim because he thought victim was going to kill him and prosecutor didn't think that such story was true. People v Schwartzman, 24 NY.2d 241, People v Burnside, 52 A.D.2d 626.

DATED: FEBRUARY 1978

Respectfully Submitted

/s/ David Barnes
DEFENDANT-PRO-SE

Numerical references preceded by W are pages of the Wade, those preceded by Tr. are of the Trial.

To be argued by
MICHAEL MELINGER

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent,
—against—
DAVID BARNES,
Defendant-Appellant.

Heard on the
Original Record
County of Kings
Ind. No. 892/76

SUPPLEMENTARY BRIEF FOR DEFENDANT-APPELLANT

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Preliminary Statement

This is an appeal from a judgment of the Supreme Court, Kings County, rendered January 17, 1977, convicting appellant after trial of the crimes of robbery in the first degree (P.L. 160.15), robbery in the second degree (P.L. 160.10) and assault in the second degree (P.L. 120.05) and imposing concurrent sentences of 7½ to 15 years on the two robbery convictions and a concurrent 3½ to 7 years term on the assault conviction (Lentol, E.S., J. at Wade hearing trial and sentencing).

[Defendant's statement pursuant to Rule 5531 of the New York Civil Practice Law and Rules is omitted.]

Timely notice of appeal from the judgment was filed and on March 4, 1977, this court granted appellant leave to appeal as a poor person on the original record and typewritten briefs and assigned Barry G. Rhodes, Esq., as counsel on appeal. On June 24, 1977, this court assigned Michael W. Melinger, Esq., as counsel on this appeal and relieved appellant's prior new appointed counsel from his assignment.

Appellant is now incarcerated pursuant to the judgment appealed herein and no application has been made for a stay pending determination of the appeal.

Questions Presented

1. Whether the prosecutor's summation was highly inflammatory so as to prejudiced the defendant's right to a fair an impartial trial.
2. Whether the court's name calling was proper.

Statement of Facts

Kings County Indictment Number 892/76 charged appellant with robbery in the first degree, robbery in the second degree (two counts), assault in the second degree (two counts) and grand larceny in the third degree based on a robbery and assault of Richard Butts on March 15, 1976.

Court's Name Calling

In reference to the court's preparing to charge the jury with the lesser included offenses, the defendant submits that under the circumstances of his taken the witness stand in his own defense, and upon his dening his guilt and asserting his innocence (Tr. pp 101) that it would been unnecessary to charge the jury with lesser included offenses. The court then call the defendant a masochist (Tr. pp 126-127.)

Prosecutor's Summation

The prosecutor stated in his summation to the jury: "does defendant has an interest in the outcome of this case, and is he more apt. tp lie than Butt? You better believe it, you better believe it, you better believe it. He has a whole lot riding on this trial, as you well know it (Tr. pp 159). I would geniunely—its obvious to you, without raising my voice, that on March 16th, he as a thief, he was a cheat, he was stealing. I think you all know that you can't work and collect welfare benefits, that's against the law. You think he was any less a thief on March 15th, than he was on March 16th,? He made himself out to be what he is, a thief, liar, and a cheat (Tr. pp. 160). And you are probably sitting there, thinking to yourselfs, well, its easy for Silverman to say. But we'er not D. A.'s, well in any event, use your everyday common sense, experience, and if you evalute the witnesses that you heard you evalute this man, what he is, you don't have to be a college professor, you don't have to be a judge, you don't have to be a District Attorney. But you can come to only one conclusion, that he beat the hell out of Butts and took his money and was guilty of robbery and all the other crimes (Tr. pp. 161).

The Verdict and Sentence

The jury found appellant guilty on one count of robbery in the first degree, one count of robbery in the second degree and one count of assault in the third degree. On January 17, 1977, appellant was adjudicated a second felony offender and was sentenced to concurrent terms of 7½ to 15 years on the two robbery convictions and to a concurrent term of 3½ to 7 years on the assault conviction (sentence Minutes at 6, 8-9).*

Numerical references preceded by Tr. pp. are pages of the trial transcript.

ARGUMENT

POINT I

Prosecutor's Remark's Concerning Defendant's Character Exceeded Permissible Bounds

The prosecutor on a number of ocassions during his summation refer to defendant, as being a liar, thief and a cheat, and that defendant was more apt. to lie than the prosecutor's witnesses. Prosecutor improperly supported his own case by his own veracity and official position when he stated on summation, that the jury did not have to be judges, college professors or district attorney's to determine, the type of evalution that should be given to appellant credibility, and that they can come to only one conclusion that defendant was guilty of robbery and all other crimes.

> "Prosecutor's performance should be aimed at justice rather than conviction and must reflect self-discipline. Code of professional responsibility, Canon 7 (EC 7-13, Dr 7-106 (c) (2), Judiciary Law Appendix. People V. Petrucelli, 44 A.D. 2d 58.

"The expression by a lawyer of his opinion as to the justness of a cause, as to the credibility of a witness, as to the culpability of a civil litigant, or as to the guilt of innocence of an accused is not a proper subject for argument to the trier of fact". EC 7-24, People V. Shanis, 36 N.Y. 2d 697 (1975), People V. McNair, 48 A.D. 2d 860, also see People V. Burnside, 52 A.D. 2d 626.

POINT II

The Court Should Not Have Aired It's Personal Opinion, As Well Deny All Defense Request To Charge.

The defendant at trial steadfastly asserted his innocence, and did not want the lesser included offenses charge to the jury. The court then call the defendant a name

(Tr. pp. 127). The trial court improperly had made an opinion and expressed it during the course of the proceedings (Tr. pp. 126-127).

> "Absence of a jury does not afford a trial judge a license to air his personal feelings on case or to comment as to character of a defendant". People V. Gardner, — A.D. 2d —, 399 N.Y.S. 2d 146 (second Dept.)

Defense counsel took an exception to his honor's refusal to charge as he requested in items 2, 3 and 4 of his requests to charge. Futher defense counsel request that his honor charge that the defendant can not be held criminally responisible for any deed done by other persons if it does not appear, beyond a reasonable doubt, that the general purpose was confronted to him and was done with his knowledge. The court again refuse to so charge (Tr. pp. 188).

A case such as this present case where as complaining witness did not know who did what acts during the course of the incident, (Tr. pp. 44-51) the court should have charged as defense requested. Pursuant to section 300.10 subd. 3 of the C.P.L. the court must charge the jury that they could rendered a verdict separately as to defendant. People V. Mc Duffie, 56 A.D. 2d 662 also see People V. Gwynn, 53 A.D. 2d 565 (1976).

CONCLUSION

For The Reasons Stated In Defendant's Points, The Convictions Should Be Reversed And A New Trial Ordered.

MICHAEL W. MELINGER, ESQ.
Attorney for defendant-appellant
of counsel David Barnes

Respectfully Submitted
/s/ DAVID BARNES
Defendant-Appellant Pro-Se

[Notarized March 17, 1978.]

To be argued:
(10 Minutes)

SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK, *Plaintiff-Respondent,* *—against—* DAVID BARNES, *Defendant-Appellant.*	Indictment # 892/76

RESPONDENT'S BRIEF

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SUPREME COURT OF THE STATE OF NEW YORK

APPELLATE DIVISION: SECOND DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK
Plaintiff-Respondent,

—against—

DAVID BARNES,
Defendant-Appellant.

RESPONDENT'S BRIEF

Preliminary Statement

This is an appeal from a judgment of the Supreme Court, Kings County, rendered January 17, 1977, convicting appellant, after trial by jury, of the crimes of Robbery in the First Degree, Robbery in the Second Degree, and Assault in the Second Degree,* and sentencing appellant to a seven and a half to fifteen year term of imprisonment. The Honorable Edward Lentol presided at trial and imposed sentence.

Statement of Facts

By Kings County Indictment Number 892/76, appellant was charged with Robbery in the First Degree, Robbery in the Second Degree (2 counts), Assault in the Second Degree (2 counts), and Grand Larceny in the Third Degree.

* The other three assailants involved in the robbery were not apprehended.

On October 20, 1976 a *Wade* hearing was held on appellant's motion to suppress identification testimony. The Court found it unnecessary to rule on the admissibility of the hospital showup in light of the independent source that existed for the in-court identification. The Court found that the complaining witness' in-court identification of appellant was admissible based on the complainant's four to five years acquaintance with appellant prior to the robbery (W63-65).*

The trial commenced on October 22, 1976. It ended on October 26, 1976 with the conviction of appellant of Robbery in the First and Second Degrees, and of Assault in the Second Degree.

On January 17, 1977 appellant was adjudicated a Second Felony Offender and was sentenced to concurrent terms of imprisonment of seven and a half to fifteen for the Robbery in the First Degree, seven and a half to fifteen for Robbery in the Second Degree, and three and a half to seven for Assault in the Second Degree.

Wade Hearing

At approximately one p.m., on March 15, 1976, RICHARD BUTTS left an apartment on the sixth floor of 117 North Oxford St., in Brooklyn. Because there was no elevator on the sixth floor of the building, he walked down the stairs to the main floor (W4). Before he reached the exit to the lobby at the bottom of the stairs, Butts was approached by four men (W17).* Butts recognized one of the men as appellant because of his prior acquaintance with him for approximately five years (W5, 36). Butts was acquainted with appellant, whom he only

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* Numbers in parentheses preceded by the letter "W" refer to the minutes of the *Wade* hearing held October 20, 1976.

* At first he only saw two men, but he subsequently realized two more men were standing near the exit door.

knew as "Froggy", from the junior high school they both had attended (W5). Thereafter, he occasionally saw "Froggy" in the vicinity of the Fort Greene Projects (W4-5. 13. 20, 43). Appellant asked Butts where he could get "something" from (W17).** Butts told him he could not help him and continued walking (W17). As he attempted to exit, the four men grabbed him and began beating him up (W17-18). They hit him on the head with a knife and stabbed him in his side and arm (W18). They also punched him in his head and eyes and inflicted cuts on his eyelids (W18, 35, 42). The four men took his money and watch (W5).

The incident lasted approximately five to seven minutes (W36). The lighting in the hallway was dim, but Butts was able to see appellant (W6). When appellant first approached him in the hallway, Butts was wearing his glasses, but dropped them to the ground when the attack began (W12, 35).

With the help of a friend Butts went to Cumberland Hospital for treatment, where he remained for eight days (W6, 14). He received stitches in his head and arm (W18) and was treated for his swollen and cut eyes (W19).

Later that day Detective HENRY AHEARN of the New York City Housing Authority Police Department went to speak to Butts at the hospital (W38, 42). The witness told the Detective that someone named "Froggy" was involved in the robbery (W43). He described "Froggy" as a brown skinned black, about his own age, with short hair (W43).

Ahearn questioned detectives who worked in the area before him. One such detective told him that there was only one "Froggy" and that was appellant Barnes (W48).

** At trial, Butts testified that the "something" was marijuana.

On March 16, 1976 Detective Ahearn and a fellow officer went to appellant's apartment (W47-49). Appellant's father opened the door and told the officers his son was home. The officers asked appellant's father to call his son. The father turned to the bedroom area and said, "Froggy, the cops want to see you" (W50). Appellant emerged from the rear of the apartment and accompanied the officers to Cumberland Hospital (W51, 54-55).

At the hospital, Ahearn spoke to Butts while appellant waited outside the hospital room. The detective told Butts that he had a suspect he wanted him to look at (W25, 56). Before he brought appellant into the room, the detective ascertained if the witness was able to see (W56-57). Butt's eyes were swollen and closed, but he could see out of his right eye by manually stretching his eyelid (W25, 58). The witness also put on his glasses (W57).

When appellant was brought into the hospital room, Butts recognized him immediately and told Detective Ahearn, ". . . that's him, that's Froggy" (W25, 58).

In a courtroom demonstration Butts was able to read newspaper headlines without his glasses (W16). The witness testified he was not under the influence of drugs on the day of the incident (W12).

The Trial

The People's Case

RICHARD BUTTS' testimony at trial, while more extensive, was substantially the same as that which he had given at the *Wade* hearing.

He added that Barnes approached him at the bottom of the stairs and asked him where he could get marijuana

(T.44, 23).* Although Butts recognized appellant from school and from the neighborhood, he had never socialized with him (T.24-25, 55). Appellant stood only about two feet from Butts when he first approached him (T.25-26). The lighting was fair, but Butts testified, "It was enough that I could see the stairway and the people that was in the stairway" (T.48-49).

Butts stated he could see to some extent without his glasses (T.33, 65). In a courtroom demonstration he was able to read a newspaper located three to four feet away from his face without the aid of the glasses (T66-67). He was also able to see the prosecutor's face and recognize the color of his tie without the aid of his glasses (T67).

At the hospital Butts was treated for his injuries. He could not see out of his left eye for two to three days after the robbery (T68). His right eye was swollen too during that period, but he was able to see by pulling his eyelid up (T69).

The Defense Case

DAVID BARNES testified in his own behalf. He said his name was "Froggy" and his nickname was "Frog" (T99). His father though, only calls him David (T99-100).

Appellant testified he never attacked Butts nor attempted to rob him (T98-99, 101). In fact, he had never met Butts until he saw him in the courtroom (T97). Appellant was home until 3 p.m. on the day of the robbery. His girl friend and father were home with him all day except his father went to the store at 2:30

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* Numbers in parentheses preceded by the letter "T" refer to minutes of the trial.

p.m. (T100-202). At 3 p.m. appellant left home to visit a friend at 79 North Oxford Walk (T117).

POINT I

The Court Did Not Improperly Bar Evidence Of The Psychiatric History Of The Complaining Witness. (Answering Points I and II of Appellant's Brief).

At trial, defense counsel asked Butts if he had ever had any psychiatric treatment. The Court ruled that the question was improper. The basis of defense counsel's question was a blackout the witness once experienced on the street and for which he was treated in a hospital. The cause of the blackout was never determined (T58-59).

Appellant now argues that the Court improperly excluded evidence of Butts' psychiatric history. The People submit the Court's ruling was proper since the blackout and the subsequent treatment do not constitute psychiatric evidence, i.e. evidence of mental illness that would affect credibility or ability to observe.

Moreover, even assuming *arguendo*, this to be psychiatric evidence, the Court's ruling was still proper. The rule is that evidence of insanity at the time of the incident at issue or at the time of trial is admissible if it substantially affects the witness' testimonial capacity. See, Prince, *Richardson on Evidence*, # 507 (10th Ed., 1973); Wigmore, *Wigmore on Evidence*, # 931-935, vol. 3A (3rd Ed. 1970). But a trial court's ruling on admissibility of evidence of mental illness will be overturned only if there is an abuse of discretion. *Ellarson v. Ellarson*, 198 App. Div. 103 (3rd Dept. 1921); *People v. Sorge*, 301 N.Y. 198 (1950). Abuse of discretion has been found only where a witness has a long and serious psychiatric history. See, *People v. Rensing*, 14 N.Y. 2d 210 (1946); *People v. Souvenir*, 14 N.Y.2d 210 (1964); *People v. Mandel*, App. Div. 2d — (2nd Dept. 1978) (decided 3/20/78, N.Y.L.J. 3/27/78, *Ellarson v. Ellarson, supra.*

For example, the witness in *People v. Rensing, supra*, had a long history of paranoid schizophrenia, had been hospitalized on several occasions, and suffered from visual and auditory hallucinations with a marked memory defect. *Ellarson v. Ellarson, supra*, held it was *not* an abuse of discretion to exclude evidence that the witness had been in an insane asylum in the past: "She may still have been entirely sane, though once having been committed to an insane room." at 107.

There is no evidence in the case at bar that the blackout affected the credibility of the witness at the time of the robbery or at trial. See, *People v. Rensing, supra.* Thus, appellant was not improperly prejudiced by the Court's ruling that the complainant's blackout episode was irrelevant, and the Court did not abuse its discretion in so ruling.

POINT II

The In-Court Identification Of Appellant Was Admissible In That It is Based Upon Independent Source And Was Reliable (Answering Appellant Point III and Appellant's First *pro Se* Brief, Point I).

Appellant contends the hospital showup tainted the in-court identification by Butts of appellant, and that there was insufficient evidence of an independent source to sustain the in-court identification. The People respectfully disagree.

The trial Court did not rule on whether the out of court hospital identification was unnecessarily suggestive. But even assuming *arguendo*, that the hospital showup was unnecessarily suggestive,* the People have established

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* We are not conceding that the showup was improper in light of *Manson* v. *Brathwaite*, — U.S. —, 53 L.Ed. 2d 140 (1977). The hospital confrontation, although perhaps suggestive, was

[Footnote continued on following page]

by "clear and convincing" evidence that the in-court identification had a source independent of the showup. *People* v. *Clarke*, 55 A.D. 2d 624 (2d Dept. 1976); *People* v. *Gray*, 47 A.D.2d 674 (3rd Dept. 1975); *United States* v. *Wade*, 338 U.S. 218 (1967); *Gilbert* v. *California*, 338 U.S. 263 (1967); *People* v. *Rahming*, 26 N.Y.2d 411 (1970); *People* v. *Ballott*, 20 N.Y.2d 600 (1967).

The burden of establishing independent source is easily met because courts are cognizant of the fact that a witness of a crime is likely to form a strong image of a perpetrator in a very short time during the course of a crime. See, *Coleman* v. *Alabama*, 399 U.S. 1 (1969); *People* v. *Spinks*, 37 A.D.2d 424 (3rd Dept. 1971); *People* v. *Thomas*, 40 A.D.2d 913 (3rd Dept. 1972). *A Fortiori*, when a witness has in addition a prior acquaintance with a defendant, the burden of establishing independent source is more easily met. See, *People* v. *Clarke*, *supra*.

Butts was acquainted with appellant for approximately five years prior to the robbery (W5, 36; T24-25, 55). They were not social friends but were well acquainted so that the witness would nod to appellant when he would see him on the street.

Butts also had adequate opportunity to view appellant at the time of the crime. He was wearing his glasses when appellant first approached him at the bottom of

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reliable because of the closeness in time to the crime, the certainty demonstrated by Butts that appellant was the perpetrator, the previous acquaintance of Butts and appellant, and his accurate description of appellant to the police. In light of these factors, there is no "substantial likelihood of irreparable misidentification." See, *Neil* v. *Biggers*, 409 U.S. 188 (1972). *People* v. *Logan*, 25 N.Y.2d 184 (1969); *People* v. *Blake*, 35 N.Y.2d 331 (1974); *People* v. *Peacock*, 37 A.D.2d 999 (2d Dept. 1971), *rev'd* on other grounds, 31 N.Y.2d 907 (1972); *People* v. *Smith*, 46 A.D.2d (1st Dept. 1974), *aff'd* 38 N.Y.2d 882.

the stairs (W12. 35; T33). Moreover, appellant stood only approximately two feet away from the witness (T26). Although it is true Butts dropped his glasses when the attack began, he is able to see without them at that distance (T33, 65, 66-67). The lighting in the hallway was adequate for viewing appellant (T48-49). Finally, appellant gave an accurate description of appellant to the police, including the essential fact that he was known as "Froggy" (W43).

In conclusion, the evidence is clear that there was independent source for the in-court identification. Moreover, it was reliable and not prone to mistaken identification. *Manson* v. *Brathwaite*, — U.S. —, 53 L. Ed. 2d 140 (1977).

POINT III

The Court's Brief Questioning Of Appellant At Trial Was Proper (Answering appellant's Point IV and appellant's First *pro se* brief Point III).

The People submit that the Court's brief questioning of appellant during cross-examination concerning his welfare check (T12) and concerning a previous robbery (T113)* was proper.

It is well established that a trial Court is permitted to question defense witnesses for the purpose of clarifying testimony or eliciting important facts. *People* v. *Limage*, 57 A.D.2d 906 (2d Dept. 1977); *People* v. *Mendes*, 3 N.Y.2d 120 (1957). *People* v. *Hinton*, 31 N.Y.2d 71 (1972), *cert. denied* 2110 U.S. 911; *People* v. *Matos*, 46 A.D.2d 903 (2d Dept. 1974); *People* v. *Welch*, 56 A.D. 2d 971 (3rd Dept. 1977). However, a trial court must proceed with caution and not abuse this pre-

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* The Court asked appellant where he dropped the knife involved in the robbery.

rogative. Examples of abuse of discretion include asking 76% of the questions on direct examination, *People* v. *Brown*, 53 A.D.2d 867 (2nd Dept. 1976), commenting on defendant's testimony to the extent of conveying to the jury the court's opinion on the merits of the case, *People* v. *McRae*, 54 A.D.2d 664 (1st Dept. 1976), answering questions posed by counsel and rehabilitating prosecution witnesses, *People* v. *Davis*, 53 A.D.2d 870 (2nd Dept. 1976), and denigrating defense counsel, *People* v. *Vasquez*, 47 A.D.2d 864 (2nd Dept. 1975).

In the case at bar the Court's questioning of appellant was very brief and merely clarified certain points in the testimony. The Court did not in any way communicate to the jury its opinion on the merits of the case or a disbelief of appellant's testimony. Moreover, the questions were not disruptive of the proceedings and did not serve to preempt counsel's role.

POINT IV

Appellant Was Not Denied Effective Assistance Of Counsel (answering appellant's First *pro se* brief, Point II).

Appellant asserts he was denied effective assistance of counsel. He claims his attorney, Robert Schmukler, did not interview him until the commencement of trial and was thus unable to adequately investigate and prepare his case. As a result, an alleged alibi defense was never developed. Further other favorable evidence remained undisclosed, as for example, evidence that the complaining witness had not worked the week before the robbery.*

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* He also argues that Butts' testimony that he was visiting his friend Linda in apartment 6-E right before the robbery is controverted by Linda's school records which indicate she was in school on that day. We note, though, that the prosecutor stipulated to that fact at trial (T95, 131).

There is no indication in the record that defense counsel did not consult with appellant until trial or that he was unfamiliar with the case. At no time did defense counsel state that he had inadequate preparation time. Nor did appellant ever register protest during the proceedings as to defense counsel's representation of him. In fact, the record indicates that defense counsel was well prepared and thoroughly familiar with appellant's case. (See, *People* v. *Droz*, 39 N.Y.2d 457 (1976) for an example of inadequate preparation). There is no evidence that appellant had an alibi defense not already presented at trial. We note appellant did take the stand and testify that his father and girl friend were home with him on the day of the robbery (T100-101). Similarly, there is nothing in the record to indicate that Butts was not working the week before the robbery. Even assuming this was true, that fact would merely go to the witness' credibility.

Even assuming *arguendo* that appellant did not receive the most effective assistance of counsel possible, we respectfully submit that a defendant is not entitled to flawless counsel. *United* v. *Vallenzuela*, 51 F.2d 414 (8th Cir. 1975), *cert. denied*, 424 U.S. 916; *People v. LaBree*, 34 N.Y.2d 257 (1974). In order to prove ineffective assistance of counsel, a defendant must demonstrate that counsel's conduct was such as to render the proceedings a farce and mockery of justice, and shock the conscience of the court. *United States v. Wight*, 176 F.2d 376 (2d Cir. 1949), *cert. denied*, 338 U.S. 950 (1950). *Lunz v. Henderson*, 533 F.2d 1322 (2d Cir. 1976), *People v. Brown*, 7 N.Y.2d 359 (1960); *People v. Tomaselli*, 7 N.Y.d 350 (1960); *People v. LaBree, supra; People v. Jones*, 30 A.D.2d 1038 (4th Dept. 1968), *aff'd* 25 N.Y.2d 637; *People v. Bennett*, 29 N.Y.2d 462 (1972). In light of the record, it is clear that such was not the case here.

POINT V

The Prosecutor's Summation Did Not Deprive Appellant Of A Fair Trial (Answering appellant's Second *pro se* brief Point I).

Appellant contends that several comments made by the Assistant District Attorney on summation deprived him of a fair trial. The People respectfully submit that the failure of trial counsel to object to the comments or make a motion for a mistrial should foreclose appellate review. See, Criminal Procedure Law, sec. 470.05(2); *People v. Sims*, 45 A.D.2d 747 (2d Dept. 1974), *aff'd* 37 N.Y.2d 906 (1975); *People* v. *Broady*, 5 N.Y.2d 500 (1959), *cert. denied*, 361 U.S. 8 (1959). Trial counsel apparently did not consider these statements prejudicial to appellant. Furthermore, the court should decline to invoke its "interest of justice" jurisdiction in the case at bar. No special circumstances are present to warrant such special treatment, especially in light of strength of the case and the fact that these were isolated comments and not part of a pattern throughout trial. See, *People v. Musolino*, 54 A.D.2d 22 (3rd Dept. 1976); *People v. Jones*, 32 A.D.2d 1069 (2d Dept. 1969), *aff'd* 27 N.Y.2d 501 (1970), *cert. denied*, 400 U.S. 994 (1971).

In the alternative, the People argue that the comments at issue were merely responsive to defense counsel's summation and thus were not improper. See, *People v. Marks*, 6 N.Y.2d 67 (1959), *cert. denied*, 362 U.S. 912 (1960).

Defense counsel, in his summation, continually disparaged Butt's veracity and integrity. He called him an admitted thief, referring to a minor shoplifting incident (T131). He further stated he thought Butts was lying when he testified about the robbery (T132). At the same time he stressed his own client's truthfulness (T136, 137). See also, T130, 137, 141. When the prosecutor called appellant a liar, thief, and cheat, he was being responsive

to defense counsel's comments. By these remarks the prosecutor was obviously referring to appellant's credibility as evidenced by his three robbery convictions and to the fact that appellant was collecting welfare benefits while employed.*

Finally, should this court find the prosecutor's remarks impermissible, any possible prejudice to appellant is dissipated by the trial Court's instructions to the jury that, "statements, opinions or criticism by counsel for either side are not evidence. Remember that it is your recollection of the testimony that must prevail" (T167-168). See, *People v. Broady, supra; People v. Montgomery*, 21 A.D.2d 904 (2d Dept. 1964), *aff'd* 15 N.Y.2d 732, *cert. denied*, 382 U.S. 853 (1965). *Cf. People v. Ashwal*, 39 N.Y. 2d 105 (1976).

POINT VI

The Prosecutor's Cross-Examination Of Appellant Was Proper. (Answering appellant First *pro se* brief Point III).

Appellant asserts that the prosecutor should not have questioned him concerning a previous robbery conviction because the case was on appeal.* However, appellant himself acknowledges that the Appellate Division had not yet rendered a decision. Since the robbery conviction was still an effective judgment, it was entirely proper for the prosecutor to question appellant about the crime.**

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* Similarly, we submit there was nothing improper about the comment that the jury does not have to be prosecutors or college professors to evaluate appellant's testimony, and in any case this comment was also responsive to defense counsel's summation.

* Appellant claims he informed the D.A. that his case was on appeal. The record does not so indicate.

** Cases cited by appellant are inapposite because they involve cross-examination on acquitted charges.

Appellant further charges that the prosecutor improperly examined appellant on the uncharged offense of burglary. (see, T102). The prosecutor apparently mistook a 1970 Grand Larceny conviction on which appellant received a sentence of five years probation, for a burglary charge. The prosecutor did not pursue the matter and admitted he was mistaken. Further, the Court instructed the jury not to draw an inference from the question asked (T102). In light of these facts, appellant was not in any way prejudiced.

Finally, the prosecutor properly cross-examined appellant about previous robbery convictions. *People* v. *Sorge*, 301 N.Y. 198, 201 (1950).*** *People* v. *Jacobs*, 45 A.D.2d 675 (1st Dept. 1974), cited by appellant is distinguishable on its facts. In that case the District Attorney questioned defendant on how many times and in what part of the body he had stabbed his victim in a prior homicide case. He also examined him on the "vivid" details of an assault in which the victim suffered a gouged eye. The questions asked by the prosecutor in the case at bar were not similarly inflammatory.

POINT VII

There Was No Improper Bolstering Of The Complaining Witness' Identification Of Appellant And The Court Properly Admitted Testimony That Appellant's Father Called His Son "Froggy". (Answering Point I of appellant's First *pro se* brief and Point IV of appellant's second *pro se* brief).

Appellant argues that Detective Ahearn should not have been allowed to bolster Butts' identification of appellant in contravention to Criminal Procedure Law

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*** Furthermore, the prosecutor did not adduce extrinsic evidence to prove the convictions, as appellant charges.

§ 60.30 and *People* v. *Trowbridge*, 305 N.Y. 471 (1975), by testifying that appellant's father called his son "Froggy". We note that Ahearn's testimony is not what is meant by bolstering pursuant to *People* v. *Trowbridge*. Rather, what *Trowbridge* proscribed was testimony by one witness as to an identification made by another witness.

Further, there was no proof offered by defense counsel that Detective Ahearn's testimony was false, as appellant claims. Appellant is obviously confusing proof with an "offer of proof", which is a term of art. We note that the Court properly admitted Ahearn's testimony that appellant's father said, "Froggy, the cops want to talk to you" (T76). The trial Court held this statement admissible because said in appellant's presence (T74-75). If this statement is deemed to have been improperly offered for the truth of its contents, to wit: that appellant was "Froggy", such error is harmless, since appellant himself admitted that this was, in fact, his nickname.

CONCLUSION

The Judgment Of Conviction Should Be Affirmed In All Respects.

Dated: Brooklyn, New York
May, 1978

Respectfully submitted,

EUGENE GOLD
District Attorney
Kings County

SHAREN LITWIN
Assistant District Attorney
of Counsel

GELLIS & MELINGER
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Jan Ira Gellis
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Telephone
(212) 279-1371

May 4, 1978

Mr. David Barnes, No. 77-A-663
Box 51
Comstock, NY 12821

RE: Kings County Indictment 892/76

Dear Mr. Barnes:

I have just returned from the Appellate Division Second Department where I argued your appeal. I merely argued questions from my brief and did not argue the points raised by yourself in your first pro se brief and your supplementary pro se brief.

The Office of the District Attorney appeared by Ms. Sharen Litwin who argued in opposition.

I am enclosing a copy of respondent's brief that I asked Ms. Litwin to provide me so that I might forward it to you.

I will let you know as soon as I hear something about your appeal. If you have any questions, please feel free to contact me.

Very truly yours,

/s/ MICHAEL W. MELINGER
MICHAEL W. MELINGER

fpl
Enc.

B/ms

—— AD2d ——

A—May 4, 1978

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The People, etc., respondent,
v. David Barnes, appellant.

Michael W. Melinger, New York, N.Y., for appellant and appellant *pro se*.

Eugene Gold, District Attorney, Brooklyn, N.Y. (Sharen Litwin of counsel), for respondent.

Judgment of the Supreme Court, Kings County (LENTOL, J.), rendered January 17, 1977, affirmed. No opinion.

MOLLEN, P.J., HOPKINS, TITONE, SHAPIRO and O'CONNOR, JJ., concur.

STATE OF NEW YORK

COURT OF APPEALS

Before: HON. LAWRENCE H. COOKE, *Associate Judge*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,* —*against*— DAVID BARNES, *Appellant.*	Certificate Denying Leave

I, LAWRENCE H. COOKE, Associate Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated at Monticello, New York
July 20, 1978

/s/ LAWRENCE H. COOKE
Associate Judge

* Description of Order: Order of the Appellate Division, Second Department, of May 22, 1978, affirming a judgment of the Supreme Court, Kings County, rendered January 17, 1977.

STATE OF NEW YORK

COURT OF APPEALS

Before: HON. LAWRENCE H. COOKE, *Chief Judge*

THE PEOPLE OF THE STATE OF NEW YORK, *Respondent,* —*against*— DAVID BARNES, *Appellant.*	Certificate Denying Application for Reconsideration of Denial of Leave to Appeal

I, LAWRENCE H. COOKE, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that I have considered and hereby deny the application of the above-named appellant for reconsideration of my Certificate Denying Leave herein, dated July 20, 1978.

Dated at Monticello, New York
April 16, 1980

/s/ LAWRENCE H. COOKE
Chief Judge

Description of Order Sought to be Appealed: Order of the Appellate Division, Second Department, of May 22, 1978, affirming a judgment of the Supreme Court, Kings County, rendered January 17, 1977.

IN THE DISTRICT COURT OF THE UNITED STATES

FOR THE EASTERN DISTRICT OF NEW YORK

DAVID BARNES, *Petitioner,* —*v.*— E. W. JONES, Superintendent, Great Meadow Correctional Facility, *Respondent,* and ROBERT ABRAMS, Attorney General of the State of New York, *Additional Respondent.*	Application for Habeas Corpus under 28 U.S.C. § 2254

[Instructions to petitioners have been omitted.]

PETITION

1. Name and location of court which entered the judgment of conviction under attack KINGS COUNTY, SUPREME COURT.
2. Date of judgment of conviction January 17, 1977
3. Length of sentence 7½ to 15 years Sentencing judge Edward S. Lentol
4. Nature of offense or offenses for which you were convicted: Robbery First Degree, Second Degree Assault, Second Degree Robbery
5. What was your plea? (Check one)

   (a) Not guilty (/)

   (b) Guilty ( )

   (c) Nolo contendere ( )

   If you entered a guilty plea to one count or indictment, and a not guilty plea to another count or indictment, give details: None

6. Kind of trial: (Check one)

   (a) Jury (/)

   (b) Judge only ( )

7. Did you testify at the trial? Yes (//) No ( )

8. Did you appeal from the judgment of conviction? Yes (/) No ( )

9. If you did appeal, answer the following:

   (a) Name of court Appellant Division, Second Department,

   (b) Result Affirmed without an opinion

   (c) Date of result May 22, 1978

   If you filed a second appeal or filed a petition for certiorari in the Supreme Court, give details: COURT OF APPEALS, denied leave to appeal, Cooke J. UNITED STATES SUPREME COURT, denied writ of Certiorari, October 1, 1979.

10. Other than a direct appeal from the judgment of conviction and sentence, have you previously filed any petitions, applications, or motions with respect to this judgment in any court, state or federal? Yes (/) No ( )

11. If you answer to 10 was "yes", give the following information:

    (a) (1) Name of court EASTERN DISTRICT, NEW YORK

    (2) Nature of proceeding HABEAS CORPUS

    (3) Grounds raised Court's prohibiting cross-examination with respect sole complaining witness, the court erred in its ruling finding that the complaining witness in court identification would be admissionable base

on complaining prior knowledge of petitioner, petitioner was denied effective assistance of trial counsel and prosecutor and trial judge guestioning of petitioner was improper.

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (/)

(5) Result petition dismissed

(6) Date of result November 27, 1978

(b) As to any second petition, application or motion give the same information:

(1) Name of Court COURT OF APPEALS STATE OF NEW YORK

(2) Nature of proceeding REARGUEMENT OF APPEAL

(3) Grounds raised Ineffective appeal counsel

(4) Did you receive an evidentiary hearing on your petition, application or motion? Yes ( ) No (/)

(5) Result denied

(6) Date of result April 16, 1980

(c) As to any third petition, application or motion, give the same information:

(1) Name of court None

(d) Did you appeal to the highest state court having jurisdiction the result of any action taken on any petition, application or motion:

(1) First petition, etc. Yes (/) No ( )

(2) Second petition, etc. Yes (/) No ( )

(3) Third petition, etc. Yes ( ) No ( )

(e) If you did *not* appeal from the adverse action on any petition, application or motion, explain briefly why you did not: None

[Instructions to petitioners and a list of possible grounds for relief have been omitted.]

A. Ground one:

Supporting FACTS (tell your story *briefly* without citing cases or law): Petitioner has been denied effective assistance of counsel on appeal in the Appellate Division Second Department Judicial Department and in the New York State Court of Appeals, neither the Court of Appeals or the Appellate Division has a corrective process to dispose of this claim. Petitioner attempted to litigate his claim in the State Court's but was denied any relief.

14. Do you have any petition or appeal now pending in any court, either state or federal, as to the judgment under attack? Yes ( ) No (/)

15. Give the name and address, if known, of each attorney who represented you in the following stages of the judgment attacked herein:

(a) At preliminary hearing Sue Ketchum Legal Aid Society

(b) At arraignment and plea Sue Ketchum Legal Aid Society

(c) at Trial Robert Schmulker

(d) At sentencing Robert Schmulker

(e) On appeal Michael Melinger

(f) In any post-conviction proceeding None

(g) On appeal from any adverse ruling in a post-conviction proceeding: None

16. Were you sentenced on more than one count of an indictment, or on more than one indictment, in the same court and at the same time?
Yes (/) No ( )

17. Do you have any future sentence to serve after you complete the sentence imposed by the judgment under attack? Yes ( ) No (/)

[Irrelevant questions as to future sentences have been omitted.]

Wherefore, petitioner prays that the court grant petitioner relief to which he may be entitled in this proceeding.

I declare under penalty of perjury that the foregoing is true and correct.

Executed on 9/4/80
(Date)

/s/ David Barnes
(Signature)

[Defendant's affidavit in support of his request to proceed *in forma pauperis* has been omitted.]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES OF AMERICA EX-REL DAVID BARNES,
Petitioner,

—against—

E.W. JONES, Superintendent of Great Meadow Correctional Facility,
Respondent,

Memorandum In Support

This memorandum is submitted in support of Petitioner's Petition for writ of Habeas Corpus, claiming that the no merit brief filed at the Appellate Division Second Judicial Department by assigned counsel failed to provide Petitioner with effective assistance of counsel; it did not justify either counsel's abandonment of his client or his refusal to argue issues raised in Petitioner's *Pro-Se* briefs.

Statement Of Facts

Kings County Indictment No. 892 of 1976, charged Petitioner with robbery in the First Degree, robbery in the Second Degree (two counts), assault in the Second Degree (two counts) and grand larceny in the third Degree based on a robbery and assault of Richard Butts on March 15, 1976.

After his motion to suppress the identification by the complaining witness had been denied, Petitioner went to trial before the Honorable Edward S. Lentol and a jury. The jury found Petitioner guilty on one count of robbery

in the First degree, one count of robbery in the second degree and one count of assault in the third degree. On January 17, 1977, Petitioner was adjudicated a second felony offender and was sentenced to concurrent terms of 7½ to 15 years on the two robbery convictions and to a concurrent term of 3½ to 7 years on the assault conviction (Sentence Minutes; p. 6, 8-9).

The Appeal

Petitioner filed a timely Notice of Appeal with affidavit for leave to Proceed In Forma Pauperis and assignment of counsel from the Judgment entered against Petitioner on January 17, 1977 to the Appellate Division, Second Judicial Department, requesting permission to appeal from the Judgment of conviction as an indigent person and for assignment of counsel on appeal. On March 4, 1977, The Appellate Division granted the motion and assigned Barry G. Rhodes, Esq. Of 16 Court Street, Suite 1210, Brooklyn, New York, 11241, as counsel on appeal. Furthermore, on June 24, 1977, the Appellate Division, on the Court's own motion, ordered that assigned counsel Barry G. Rhodes, Esq, be relieved of assignment and assigned Michael W. Melinger, Esq, of 2 Penn Plaza, New York, New York, 10001 as counsel to Prosecute appeal pursuant to Article 18-b Section 722 of the County Law. (The order of assignment of counsel is annexed hereto as Exhibit "A").

Assigned counsel and Petitioner communicated Via correspondence. On or about November 7, 1977, the Petitioner wrote counsel a letter specifying the points of law he wished raised on appeal.

On or about November 9, 1977, the Petitioner received a letter from assigned counsel stating that he [assigned Counsel] was in the process of framing the points of law in Petitioner's case that he believed are

appealable. Counsel also indicated that the points of law he believed to be appealable were listed at the end of said letter. In counsel's letter he delineated seven (7) appealable issues to be raised on appeal. [Assigned Counsel's November 9, 1977, letter is annexed hereto as Exhibit "B"].

Counsel mailed the Petitioner's a copy of the Appellate brief shortly thereafter, but the Petitioner was displeased to see that it only contained three of the seven points of law that counsel had delineated in his November 9, 1977 communication.

Petitioner does not have a copy of the brief. It can easily be obtained from the Clerk of the Court, Appellate Division Second Judicial Department, 45 Monroe Place, Brooklyn, New York.

In addition, assigned counsel failed to raised points with respect to the denial of effective assistance of trial counsel and that Petitioner's sentence as a second felony offender was illegal, improper and invalid as the requirement of section 400.21 of the Criminal Procedure Law were not adhered to. The Petitioner's Attorney brief merely consisted of 14 pages of perfunctory colloquy and did not spell out pertinent issues that Petitioner had suggested.

Upon the Petitioner's receipt of the said brief, he immediately dashed off a *pro se* letter to the Clerk of the Court, Appellate Division, Second Judicial Department. [See Second Judicial Department file under indictment 892/76]. Petitioner complained about the paucity of argument advanced on his behalf, claiming that the brief did not give so much as "a chance" on appeal, and reguesting permission to file a *pro se* brief.

Petitioner's request to file a *pro se* brief was granted. Accordingly, the Petitioner filed a *pro se* brief and [be-

cause he had forgotten to include certain points of law] an additional *pro se* supplementary brief, raising the issues that assigned counsel failed to raise.

On or about May 4, 1978, the Petitioner received a communication from assigned counsel stating that he [Counsel] had just returned from the Appellate Division, Second Judicial Department, where he argued Petitioner's appeal.

Counsel admitted that he *merely* argued questions from his [Counsel] brief and that he did not argue the points raised by Petitioner in his first *pro se* brief and *pro se* supplementary brief. Assign counsel additionally indicated that he had enclosed a copy of respondent's brief in his communication. [Attached as Exhibit "C"].

Petitioner being a layman at law did not know the appropriate remedy to rectify matters. Until recently, the case of *People* v. *Federico Gonzalez*, 47 N.Y.2d 606, 419 N.Y.S.2d 913, (1979), was brought to Petitioner's attention wherein it is noted that a motion to reargue the appeal maybe the appropriate remedy. The Court of Appeals nor the Appellant Division have a corrective process to dispose ineffective of assistance of counsel claim according to title 28 U.S.C. 2254, Subd (b).

Providing the Court of Appeals and the Appellant Division with an opportunity to hear and consider a remedy, Petitioner's application for reargument was denied by Chief Justice Lawrence Cooke, on April 16, 1980. [See Exhibit "D" Attached hereto].

ARGUMENT

The No-Merit Brief Filed At The Appellate Division By Assigned Counsel Failed To Provide Petitioner With Effective Assistance Of Counsel: It Did Not Justify Either Counsel's Abandonment Of His Client Or His Refusal To Argue Issues Raised In Petitioner's *Pro Se* Briefs.

I.

There is no need, at this late date, to dwell at length upon the right of an indigent Petitioner to have free counsel available to him on a first appeal when that appeal is available as a matter of right. Indeed, to a large degree this Court's decisions in this field, [*People* v. *Borum*, 8 NY2d 177, (1960); *People* v. *Hughes*, 15 NY2d 172 (1965))] coincided with similar developments in Federal Constitutional Law [*Griffin* v. *Illinois*, 351 U.S. 12 (1956); *Douglas* v. *California*, 373 U.S. 353 (1963)] to achieve a parity between the indigent and non-indigent criminal Petitioner. See generally, ABA project on minimum standards; criminal Appeal 3.2 and commentary thereto (Approved Draft 1970).

It is equally clear that a criminal Petitioner is entitled both at trial and on appeal [*High* v. *Rhay*, 519 F2d 109 (9th Cir. 1975] to more "than just a person with a law degree nominally pepresent him] *People* v. *Bennett*, 29 NY 2d 462, 466 (1970). He is entitled to have "single-minded counsel" (*People* v. *Emmett*, 25 NY 2d 354, 356 (1969) who will review and prepare both the law and the facts relevant to the defense (*People* v. *Droz*, 39 NY 2d 457, 462 (1976), a lawyer whose efforts "must in fact be susceptible of being deemed of an assistive nature" *People* v. *Labree*, 34 NY 2d 257, 261 (1974). These minimal, almost self-evident, precepts of advocacy, were lacking below. The result; a conclusory "no-merit" brief and one client cashiered.

The title page of the document filed below promises an "Petitioner's Brief", but nothing of the sort is delivered. From beginning to end. It violates commonly accepted precepts of what an advocate's document is supposed to be. It barely serves the function of an amicus brief, itself no substitute for a partisan's presentation [*Ellis, supra*]. The "statement of facts" is a useless chronicle, an undiscriminating abstract of the record which regurgitates testimony in slightly condensed form, in precisely the sequence it appears in the record. No attempt was made to shape the presentation in a manner calculated to show the weaknesses, contradictions and implausibilities of the witnesses or to heighten the impact of the many adverse rulings Petitioner suffered at trial.

The only argument counsel was prepared to offer took issue not with his client's conviction, but with his client's entitlement to Petitioner relief, denouncing his client's cause as being 'without merit." It was counsel's considered judgment, for example, that Petitioner's sentence was not even arguably excessive or illegally imposed. So undebatably fitting was the 7½ to 15 years term that counsel professed an inability to marshall "any sort of argument" in favor of its reduction. It is hard to imagine a defense lawyer who finds himself at a total loss for words when a stiff sentence such as 7½ to 15 years hangs over his client's head; indeed, the excessive sentence claim was non-frivolous as a matter of law *People* v. *Coleman*, 30 NY 2d 582 (1972); *cf People* v. *Green*, 61 AD.2d 962 (1st Dept. 19878) [concurring opinion].

There are possible explanations for counsel's inaction, but none of them is particularly consoling to Sixth Amendment concerns. Perhaps, for example, he did not know that the Appellate Division has the power to reduce sentence in the interests of justice, maybe he forgot to examine the probation report as he entitled to do (CPL. Section 390.50 subd 2); *People v. Rogers*, 54 AD 2d 616,

617 (4th Dept. 1976]; Perhaps, since the 'statement of facts' omits any mention of the sentence proceedings, he never studied that portion of the record.

In any event, it certainly does not seem that he tried very hard; for there were plenty of complaints to be raised about the punishment imposed; Petitioner's sentence as a second felony offender; Petitioner's ineffective assistance of trial counsel claim. All of them were right on the face of the record and none was terribly exotic or complex.

There is scant profit in cataloguing in detail the brief's other departures from the norms of advocacy. Suffice it to say that the brief does not reveal that lawyerly judgments were exerted upon either law or fact in a manner reasonably calculated avail the petitioner or to deflect a busy court from its institutional inclination toward affirmance. It seems more the product of the indifferent layman than the "guiding hand of counsel" [*Powell* v. *Alabama*, 287 U.S. 45, 69 (1932].

II.

Lest the Sixth Amendment's guarantee deteriorate to a "mere formal appointment" [*Avery* v. *Alabama*, 308 U.S. 444, 446 (1940], assigned counsel on appeal who would ascribe "no merit" foundation for such an abandonment of a client. Quite apart from the ethical issues raised by a public "no-merit" posture [See ABA code of Professional Responsibility, EC 2-32], the Supreme Court has taken steps to protect petitioners from premature withdrawal by assigned counsel.

Anders v. *California*, [386 U.S. 738 (1967)] involved a drug offender who was assigned a lawyer to his appeal. The lawyer concluded after reading the record that there was "no merit" to his client's appeal, and so informed the court. The defendant, in turn asked to have new counsel assigned, but the reguest was denied and the conviction

affirmed shortly thereafter. The Court found California's "no merit" letter procedure inadequate to guarantee effective assistance of counsel to the indigent defendant, and found the lawyer's letter too conclusory to accept as a worthwhile evaluation of the case.

Instead, assigned counsel who wants to withdraw is obliged to file a brief "referring to anything in the record arguably an appeal"], [386 U.S. at 744]. Counsel's "ready references not only to the record but also to the legal authorities"] [id. at 745] will enable the appellate court to make its own assessment; and unless it finds all the possible points frivolous," it must, prior to deciding the merits of the case, appoint a new lawyer to argue the appeal [id at 744].

Assigned counsel's refusal to raise and argue the points raised in petitioner's *pro se* briefs is not just a mere irregularity, but constitutes abandonment of a client and a substantial denial of effective assistance of counsel on appeal. In effect, counsel's abandonment forced the petitioner, w[illegible]se a layman at law, to inexpertly prepare and file *pro se* briefs.

Furthermore, assigned counsel refused to argue the points of law raised therein. Counsel did not provide petitioner with a copy of respondent's brief until *after* the hearing and oral argument was concluded. Thus, petitioner was denied an opportunity to refute or reply to the respondent's brief in opposition to the points raised in petitioner's *pro-se* briefs.

Because it is the court and not counsel who is finally to decide whether an indigent is to remain lawyerless [*id.*], assigned counsel is obliged to provide the court with an adequate foundation for the independent assessment of whether there were non-frivolous issues to be raised by a newly appointed lawyer. In essence, then,

assigned counsel who refuses to serve his client's needs must, at the very least, serve the court's and what the court needs is a

> "professional exposition of all points which have sufficient significance that trained counsel would at least identify and consider them in his evaluation of the appeal"

Nickols v. Gagnon, 454 F 2d 467, 470 (7th Cir. 1971) [Stevens, J]

No particular format is contemplated. All that matters is that counsel's document—whether it be a brief, a motion, or a letter—be reasonably designed to call the court's attention to those specific issues ostensibly preserved for review, which he has deemed! meritless' or frivolous.*

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* Courts recognize the difference for *Andcrs* purposes between the frivolous appeal and the appeal that loses. In *State* v. *Mueller* [552 P.2d 1089 (Wash. App. 1976)]; for example, the lawyer originally assigned sought to withdraw on the grounds of frivolousness.

When his papers failed to show adequate basis for that conclusion, a second lawyer was appointed in his stead. A full brief on the merits was then filed, and the conviction was affirmed. That the prosecution might ultimately be able to muster arguments to withstand a reversal is not the constitutional equivalent of an advocate to fully brief and argue a client's cause. The notion of 'frivolousness' eludes precise and ready definition; neither Supreme Court nor the ABA Standards [criminal Appeals 1970] essay one. This Court seems to have equated it with a sort of undebatable futility ["so frivolous on its face as to require no argument to demonstrate it", *Bachrach* v. *Manhattan* R.R. Co. 154 NY 178 (1897]. One recent text has settled upon the idea of "hopelessness" [JUSTICE ON APPEAL, CARRINGTON, MEADOR & Rosenberg (West, 1976) at p. 601.

Another writer has described the frivolous appeal as "a loser, not just a probable loser but a clearly hopeless loser", and has set out 9 attributes of such a case. Hermann, FRIVOLOUS CRIMINAL APPEALS, 47 N.Y.U. L. Rev. 701, 707 (1972).

Only then will the court be in a position to make the independent assessment which lies at the heart of *Anders*. Compare the detailed letter in *Nichols* v. *Gagnon* [supra, 454 F 2d at 469 nn. 1 & 4] which "discussed and evaluated" several possible issues and supplied case citations, with the skimpy and unenlightening documents found wanting in *High* v. *Rhay* [519 F 2d 109 (9th Cir. 1976], *Comm* v. *Bartol* [279 A. 2d 771 (Pa. Super. 1971], and *People* v. *Lang*, [520 P.2d 593 (Cal. 1976].

Unfortunately, the opaque and indiscriminate presentation below all but obscured a number of briefworthy events which occurred at trial and which went to its essential fairness. Counsel noted some of these, albeit skeletally and without fanfare, in the 'Statement of facts', but he never mentioned them again, even by way of disparagement. Other items he never saw fit to mention at all [*e.g.*, the summation of the prosecutor was improper in that it exceeded permissible bounds; the trial court improperly denied petitioner's request to charge; sentence proceedings].

It is always unrealistic, of course, to expect an Appellate Division, with its oppressive volume of cases, to spot, frame and research issues * without the marshalling

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* To avoid the cloning of issues and the burden to all of briefing an appeal within an appeal [*People* v. *Hall*, 32 NY.2d 546, 552 (1973)], we note only some of these briefworthy possibilities, and do so only in outline form. To require this Court to consider, and counsel to brief, the merits of "all aspects of any appeal" (id.) would be too "cumbersome" and would "almost mandate the ballooning" of each similar claim into a "full-blown appeal" (id. at 553).

One of the arguable issues involves the trial court's refusal to instruct the jury, in accord with a timely request by the defense, that the evidence alleging defendant's role in the crime be weighed independently from co-defendants. There is substantial case law for such an instruction (*People* v. *Harris*, 51 AD.2d 937

[Footnote continued on following page]

efforts of counsel [*People* v. *Emmett*, 25 NY2d 354 (1969). Indeed, one of counsel's more esteemed functions is to do precisely what the undifferentiating presentation below never seriously attempted; to define and raise "issue which might otherwise escape the judges' notice" [id. at 35]. For all practical and constitutional purposes, then, the brief left the Appellate Division with little more than the "cold record" [*Anders*, *Supra*, at 745] to review without benefit of an advocate's focusing ministrations; it "did not provide that full consideration of the matter as is obtained when counsel is acting in that capacity" [*id.* at 744].

(1st Dept. 1976); *People* v. *Range*, 49 AD.2d 832 (1st Dept. 1975; accord, People v. Kerr, 61 AD2d 762 (2d Dept. 1978), People v. McDuffie, 56 AD.2d 662 (2nd Dept. 1977), and it seems mandated by statute as well [CPL. Section 300.10 (3); Must instruct the jury to render a verdict separately on each count"; People v. Britt 43 N.Y. 111, (1977); "must means must", harmless error analysis inapplicable[. The charge issue is thematically connected to the trial court's denial of a timely motion to sever the counts for trial, itself an arguable abuse of discretion [See, e.g. *People* v. *Forest*, 50 AD. 2d 260, 262, (1st Dept 1975)]; compare *People* v. *Cobenais*, 39 NY 2d 968 (1976].

Another issue area involves petitioner's sentence as a predicate felony. At the sentencing the petitioner was furnished with a copy of the statement of predicate felony conviction by the People pursuant to Section 400.21 of the CP.L. and asked whether he wished to controvert allegations made in the statement. Petitioner's reply was affirmative that he was raising an objection that any previous conviction was obtained in violation of his constitutional rights, specifically, that he was indequatley represented by counsel, HARVEY L. GREEN BERG, on Indictment No. 6074/70, which the allegation of the predicate felony were based. Again, there is such an abundance of authority on this issue that it is hard to image its omission from an advocate's document. See, e.g. *People* v. *Broderick*, 24 AD. 2d 638, 262 NYS. 2d 188, (1965); *People* v. *Lindbergh*, 33 AD. 2d 800, 307 NYS, 2d 125; *People* v. *Woodard*, 48 AD2d 980, 369 NYS2d 580 (1975); *People* v. *Fraser*, 54 AD2d 965, 388 NYS.2d 652, (1976); *People* v. *Leasure*, 34 AD2d 688, 312 NYS.2d 563 (1970).

A conclusory "no merit" brief does special violence to *Anders* when filed in the intermediate appellate Courts of New York. A number of local factors makes it difficult for even competent and conscientious to discern the frivolousness of an appeal. Shifting panels of judges [Llewelien, Common law Tradition, at 251-52; 313-14] inject a good deal of peril into such predictions. So does the inclination of the Appellate Division to affirm about half of all criminal cases without writing an opinion, thereby leaving practitioners to guess what kinds of issue or cases courts consider to be "frivolous", as opposed to merely unsuccessful [see Withdrawal of Appointed Counsel From Frivolous Criminal Appeal, 49 Ind. L. Rev. 740, 755n. 68 (1974)]. The expansive 'fact' and 'interest of justice' prerogatives conferred by statute [CPL. Section 470.15] cloud the crystal ball still further by geometrically increasing the possible avenues of reversal [see Hermann, Frivolous Criminal Appeal, 47 N.Y.U.L. Rev. 701, 702n, 6 (1972)]:

We do not mean to imply that there can be no such thing in New York as a frivolous appeal. We suggest simply that these factors render the conclusory no-merit brief hazardously suspect above and beyond *Anders*' minimal concerns, and thus require a particularly lucid, complete and enlightening presentation if counsel and court are to meet their complementary *Anders* duties.

By any measure, though, the brief below was inadequate to this dual task, and the Appellate Division had no business proceeding to the merits of the appeal without first providing new counsel.

CONCLUSION

Petitioner should be released from custody or alternatively a de-novo appeal.

/s/ DAVID BARNES

[The four exhibits attached to the memorandum of law have been omitted because they are reproduced elsewhere in this appendix in their chronological place in the proceedings. They are:

A. The order of the Appellate Division of the Supreme Court of New York, dated June 24, 1977, assigning Michael Melinger to prosecute defendant's appeal (J.A. 24-25).

B. A letter from Michael Melinger to defendant, dated November 9, 1977 (J.A. 26-28).

C. A letter from Michael Melinger to defendant, dated May 4, 1978 (J.A. 70).

D. The order of the New York Court of Appeals denying reconsideration of defendant's application for leave to appeal (J.A. 73).]

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

UNITED STATES ex rel DAVID BARNES, *Petitioner,* *—against—* E. W. JONES, Superintendent of Great Meadow Correctional Facility, *Respondent.*	Affidavit in Opposition CV-80-2447

STATE OF NEW YORK)
) ss:
COUNTY OF KINGS)

KAREN M. WIGLE, an attorney-at-law and an Assistant District Attorney, Kings County, being duly sworn, deposes and states the following:

1) That this affidavit is made upon information and belief, based upon the records and files of the Office of the District Attorney, Kings County, and from those legal documents previously submitted in the instant matter.

2) That I incorporate by reference, into this reply, petitioner's appellate brief previously presented to the Appellate Division, Second Department, of the Supreme Court of the State of New York and submit this affidavit and accompanying brief in opposition to petitioner's *pro se* application for a writ of *habeas corpus*.

3) That by Kings County Indictment Number 892/76, petitioner was charged with First Degree Robbery, Second Degree Robbery, Assault in the Second Degree and Grand Larceny in the Third Degree. The charges arose out of an incident occurring on the afternoon of March

15, 1976 in the lobby of an apartment building located at 117 North Oxford Street, Brooklyn, New York. At that time and place, petitioner and three others, not apprehended, forcibly stole money and a watch from one Richard Butts. In the course of the robbery Mr. Butts suffered injuries inflicted by the fists of the perpetrators and a knife. The petitioner was apprehended and identified as one of the participants on March 16, 1976.

4) On October 26, 1976 petitioner was convicted, after a trial by jury of Robbery in the First Degree, Robbery in the Second Degree and Assault in the Second Degree.

5) On January 17, 1977 petitioner was adjudicated a Second Felony Offender and was sentenced to concurrent terms of imprisonment of seven and a half to fifteen years for Robbery in the Second Degree, and three and a half to seven for Assault in the Second Degree. (Lentol, J. at hearing, trial and sentence).

6) On March 4, 1977 the Appellate Division, Second Department, New York Supreme Court granted petitioner's application for leave to appeal as a poor person. The original appointed counsel on appeal was later relieved and on June 24, 1977 Michael W. Melinger, Esq. was appointed to represent the petitioner. Melinger filed a brief on behalf of the petitioner with the Appellate Division, Second Department. He raised four points arguing that these were reversible errors committed by the trial court. (See attached Appendix I). Petitioner, acting *pro se*, also filed a brief and two supplementary briefs. These briefs raised some of the same issues raised in his attorney's brief and some additional claims of error. (See attached Appendices II, III and IV). Following oral argument by Mr. Melinger and an Assistant District Attorney, the Appellate Division of the Supreme Court unanimously affirmed the judgment of petitioner's conviction. That order is dated May 22, 1978 (*People v. Barnes*, 405 NYS2d 621 [2d Dept. 1978]).

7) On July 20, 1978 leave to appeal to the New York State Court of Appeals was denied. (Cooke, J.)

8) Petitioner then filed an application for a writ of *habeas corpus* with the United States District Court, Eastern District of New York. In his application, petitioner raised four issues which had been raised on appeal in the State courts. They were as follows: That the trial court had prohibited defense counsel's cross-examination of the sole government witness as to his mental condition; that the court failed to rule on whether an in-court identification was tainted by a suggestive show-up identification; that the prosecutor's and trial judge's cross-examination of petitioner deprived him of a fair trial; and that defense counsel's failure to investigate factual and legal defenses deprived petitioner of adequate assistance of counsel. In a memorandum and order dated November 28, 1978, the petition was dismissed on its merits. (Nickerson, J.).

9) Petitioner subsequently petitioned the New York State Court of Appeals for reconsideration of its Certificate Denying Leave to Appeal dated July 20, 1978. This application was denied without opinion on April 16, 1980. (Cooke, C.J.).

10) Petitioner also brought a motion to set aside his sentence in the Supreme Court of the State of New York, Kings County, pursuant to N.Y. CPL § 440.20. The only issue raised in this motion was the legality of the court's action in adjudicating the petitioner a second felony offender and sentencing him as such. This petition was denied after argument by an order dated April 28, 1980. (Lentol, J.). Petitioner then sought leave to appeal to the Appellate Division, Second Department. Leave to appeal was denied on October 3, 1980 based upon papers filed in support of and in opposition to the petition. (Cohalan, J.).

Legal Argument

Petitioner now seeks relief in the form of a writ of *habeas corpus* based on his assertion that he was denied effective assistance of appellate counsel in the Appellate Division, Second Department, in violation of the Sixth and Fourteenth Amendments of the United States Constitution. In opposition to this claim, it is submitted that the petitioner has failed to exhaust existing state remedies and that the issue raised by petitioner is without merit.

It is axiomatic that upon federal *habeas corpus* review a petitioner must first exhaust all state remedies before jurisdiction will vest in a federal forum. 28 U.S.C. 2254(b); *Piccard v. Connor*, 404 U.S. 270, 276 (1971); *Johnson v. Metz*, 609 F 2d 1052, 1054-1056 (2d Dept. 1979). Petitioner has not properly raised the issue of ineffective appellate counsel in all available state forums. The rules of the Appellate Division, Second Department, allow a losing party to move to reargue the appeal. (Rule 670.5). Although the usual time limitation for such a motion is thirty days after the appeal is decided, the Court may extend that time in its discretion.

In his *pro se* application petitioner asserts that both the New York Court of Appeals and the Appellate Division have been afforded an opportunity to review his claim of ineffective assistance of appellate counsel (Petitioner's memorandum p.5). However, no application raising that issue was ever filed with the Appellate Division. Petitioner's application to the New York Court of Appeals for reconsideration of its denial of his request for leave to appeal based on these grounds was denied with no finding of fact or opinion on the merits of his claim. Thus petitioner's application should be denied and the state court afforded a reasonable opportunity to consider the merits of petitioner's constitutional claim. *United States ex rel Savino v. Flood*, 482 F. Supp. 230, 231 (E.D.N.Y. 1979).

As to the substance of petitioner's claim it is submitted that his Sixth Amendment right to assistance of counsel made obligatory on the States by the Fourteenth Amendment has not been violated. Petitioner, an indigent, was assigned counsel for purposes of prosecuting his appeal. When his original counsel was relieved for reasons having nothing to do with the merits of petitioner's appeal, Michael W. Melinger was appointed to represent him on appeal.

Petitioner's reliance on *Anders v. California*, 386 U.S. 738 (1967) is misplaced. Unlike the assigned counsel in *Anders*, appellate counsel in the instant case at no time communicated any belief that the petitioner's appeal was meritless or frivolous. Rather, on behalf of the petitioner, appointed counsel filed a complete brief with the Appellate Division, Second Department. (Appendix I). In it he raised and argued numerous claims of reversible error. In support of these arguments, appellate counsel cited relevant case law and appropriate sections of the transcripts of petitioner's trial and a pre-trial hearing. (Appendix I, p. 7-14).

Review of the brief indicates that appellate counsel carefully studied the record of petitioner's trial. Counsel emphasized and argued those facts adduced at trial and at the pre-trial hearing which supported his client's position and tended to impeach the credibility of the complaining witness. (Appendix I p. 3-6).

As the letters annexed to petitioner's application indicate, appellate counsel considered all potentially appealable issues and discussed the appeal with petitioner. Petitioner's claim appears to be based on the grounds that appellate counsel did not raise every possible issue of law in his brief or in oral argument.* However, it has been

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* One of petitioner's claims of ineffective assistance of appellate counsel is based on the fact that assigned counsel did not

[Footnote continued on following page]

held that "[c]ounsel need not appeal every possible question of law at the risk of being found to be ineffective." *Gillihan v. Rodriguez*, 551 F.2d 1182 (10th Cir. 1977), *cert. denied*, 434 U.S. 845. Further, petitioner was provided with sufficient time and opportunity to submit on his own behalf three *pro se* briefs.

The record does not support petitioner's assertion that he was denied effective assistance of appellate counsel. It certainly can not be said that counsel's conduct was so "woefully inadequate as to shock the conscience" and make the proceeding a "farce and mockery". *United States v. Yanishevsky*, 500 F.2d 1327, 1333 (2d Cir. 1974); *People v. Tomaselli*, 7 NY 2d 350 (1960).

For the reasons stated above, petitioner's application should be denied.

KAREN M. WIGLE

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raise the issue of the effectiveness of petitioner's trial counsel. This issue was reviewed on an application for a writ of *habeas corpus* and found to be lacking in merit. (Memorandum and Order dated November 27, 1978, Nickerson, J.)

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the twenty-third day of November one thousand nine hundred and eighty-one

Present:

HON. JAMES L. OAKES,
HON. THOMAS J. MESKILL,
Circuit Judges
HON. M. JOSEPH BLUMENFELD,
District Judge

DAVID BARNES,
Petitioner-Appellant,

—v.—

EVERETT W. JONES, Superintendent Great Meadows Correctional Facility and the State of New York,
Respondents-Appellees

Docket No. 81-2082

Appeal from the United States District Court for the Eastern District of New York

This cause came on to be heard on the transcript of record from the United States District Court for the Eastern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is reversed and the action be and it hereby is remanded to the said district court for further proceedings in accordance with the opinion of this court with costs to be taxed against the appellees.

A. DANIEL FUSARO, *Clerk*
/s/ EDWARD J. GUARDARO
by EDWARD J. GUARDARO,
Deputy Clerk

UNITED STATES COURT OF APPEALS
SECOND CIRCUIT

At a stated term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse, in the City of New York, on the 25th day of January, one thousand nine hundred and eighty-two.

No. 81-2082

DAVID BARNES,
Petitioner-Appellant,

v.

EVERETT W. JONES, Superintendent Great Meadow Correctional Facility, and The State of New York,
Respondents-Appellees.

A petition for rehearing containing a suggestion that the action be reheard in banc having been filed herein by counsel for the respondent-appellee, the State of New York,

Upon consideration by the panel that heard the appeal, it is

ORDERED that said petition for rehearing is DENIED, Judge Meskill dissenting.

It is further noted that the suggestion for rehearing in banc has been transmitted to the judges of the court in regular active service and to any other judge on the panel that heard the appeal and that no such judge has requested that a vote be taken thereon.

/s/ A. DANIEL FUSARO
A. DANIEL FUSARO
Clerk

by FRANCIS X. GINDHART
Chief Deputy Clerk

Opposition

No.

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1981

UNITED STATES OF AMERICA ex rel.
DAVID BARNES,

Respondent,

-against-

EVERETT W. JONES, Superintendent, Great Meadow
Correctional Facility and the State of New York,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

SHEILA GINSBERG
Counsel for Respondent
David Barnes
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ALAN MANSFIELD,
Of Counsel

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QUESTION PRESENTED

Whether the petition for certiorari should be denied in that the Court of Appeals' decision is entirely consistent with the uniform law of this Court and the only other Court of Appeals which has decided this question, because the decision holds that although an appellate lawyer may exercise discretion in selecting issues to be raised on appeal, in the limited instance in which an indigent defendant insists that certain colorable issues be raised, the wilfull refusal of appellate counsel to do so violates the sixth amendment right to the assistance of counsel.

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No.

In The

SUPREME COURT OF THE UNITED STATES

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Respondent,

-against-

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,

Petitioners.

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

RESPONDENT'S BRIEF IN OPPOSITION

This brief is submitted in opposition to a petition for a writ of certiorari to review the judgment of the Court of Appeals for the Second Circuit which reversed the district court's denial of respondent's application for a writ of habeas corpus.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Second Circuit (Pet. App. 1a-24a) is reported at

665 F.2d 427 (2d Cir. 1981). The opinion of the district court (Pet. App. 25a-29a) is unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on November 23, 1981 and a petition for rehearing was denied on January 25, 1982. The petition for a writ of certiorari was served on March 26, 1982. The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

STATEMENT OF THE CASE

In this federal habeas corpus proceeding respondent, David Barnes, challenged his state court conviction on the ground that he was denied his sixth amendment right to the assistance of appellate counsel on his direct appeal of his conviction to the Appellate Division of the New York State Supreme Court. The Court of Appeals ruled that, although assigned counsel has wide discretion in selecting issues to be raised on appeal, his wilfull refusal to raise specific colorable issues, despite his indigent client's insistence that he do so, infringed respondent's sixth amendment right to the assistance of counsel.

STATEMENT OF THE FACTS

State Court Proceedings

A. Trial Court.

On October 26, 1976, respondent was convicted in the New York State Supreme Court of second degree robbery and second degree assault. He was sentenced to concurrent

terms of seven and one-half to fifteen years. The respondent has remained incarcerated.

The State's case against respondent focused primarily on the testimony of the complainant who claimed that respondent was one of his four assailants.*/ After testifying falsely about where he had been immediately prior to the incident, the complainant testified that respondent "grabbed him from behind." The complainant conceded that respondent was not the one who took his watch and that he did not recall whether the respondent took his money. Pet. App. at 3a.

The prosecution's case was buttressed by the complainant's identification testimony of the respondent. Although, the respondent had been subjected to a manifestly unconstitutional bedside show-up,**/ the trial court held the identification was based on independent grounds. Defense counsel sought to impeach the complainant's credibility by introducing a psychiatric report which evidenced the complainant's history of "blacking-out." The trial court sua sponte ordered the complainant not to answer any questions about his history of psychiatric treatment, and trial counsel failed to make an offer of proof to show the connection between "blacking-out" and the complainant's ability to identify the respondent. Pet. App. at 3a.

The defense case relied primarily on the testimony of the respondent who stated that he had been at home with

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*/ The three other alleged assailants were never apprehended. Pet. at 2 n.1.

**/ In the words of the trial court, the bedside identification was "the worst possible way of having a showing made." Pet. App. at 3a.

his father during the time the complainant stated the robbery occurred. Not only did trial counsel fail adequately to investigate this defense, (Appendix II to document 5 of the record on appeal), but further, he neither called the father to the stand nor alluded to the alibi in summation. Pet. App. at 3a.

The trial court refused to charge the jury on the law of accessorial liability--that a defendant can only be convicted of acts committed by others if it is shown that he had knowledge thereof and intended the result. Pet. App. at 3a-4a.

B. Direct Appeal to the Appellate Division of the New York Supreme Court.

Respondent's motion in the Appellate Division of the New York State Supreme Court to appeal in forma pauperis was granted. He was assigned counsel to prosecute his appeal.

The respondent wrote to assigned counsel and directed him to raise specific issues, including the ineffectiveness of trial counsel, on the appeal.*/ The respondent's letter was accompanied by a draft of a brief. Pet. App. at 4a-5a.

Two days later, on November 9, 1977, assigned counsel answered respondent's letter and explained that he would not raise the ineffectiveness of trial counsel issue apparently on the mistaken ground that such error

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*/ Respondent also demanded that his counsel address the following errors: (a) improper cross-examination of the prosecutor; (b) failure to suppress the identification testimony of the complainant; and (c) trial court's improper exclusion of the psychiatric evidence. Pet. App. at 4a-5a.

is not cognizable on appeal.*/ Pet. App. at 4a.

With regard to respondent's supplementary brief, assigned counsel wrote that he did not necessarily agree with the points but that he was hopeful that the pro se brief would be submitted for consideration in conjunction with his own brief.

When respondent received a draft of assigned counsel's brief, it was apparent that counsel raised only three of the seven issues which were identified in the November 9 letter. Accordingly, respondent filed a second pro se brief to address certain of the claims which were omitted from his counsel's brief. Pet. App. at 5a.

Assigned counsel did not send respondent the State's responding brief--which, inter alia, addressed the pro se points--until after oral argument. Moreover, assigned counsel conceded that he only argued the points raised in his own brief during his oral presentation to the Appellate Division. None of respondent's arguments was addressed. Pet. App. at 5a.

Without opinion, the Appellate Division summarily affirmed the conviction. Leave to appeal to the New York State Court of Appeals was denied on July 20, 1978.

Subsequent State and Federal Proceedings

Respondent, pro se, moved for a federal writ of habeas corpus in the United States District Court for the Eastern District of New York in which he raised the issues

*/ Assigned counsel also stated in his November 9 letter that he refused to address the unconstitutional show-up argument as outlined by respondent. Counsel added that he would raise six other claims in his brief. Pet. App. at 5a.

addressed in his original supplemental Appellate Division brief. The district court denied the writ after considering the ineffectiveness of trial counsel claim in light of the "farce and mockery standard" established by the Court of Appeals for the Second Circuit. The prevailing New York State rule for judging ineffectiveness of trial counsel claims was the "reasonable competence" standard. Pet. App. at 6a-7a.

Respondent subsequently petitioned the New York State Court of Appeals for reconsideration of its denial of leave to appeal on the ground that he was deprived of effective assistance of appellate counsel. Respondent also challenged his sentence under the State's coram nobis procedure. Both applications were denied. Pet. App. at 7a.

Thereafter respondent petitioned the district court for the writ of habeas corpus which underlies this case based on his allegation, under the sixth and fourteenth amendments, that he was deprived of the effective assistance of appellate counsel.

The District Court Decision

The district court, after holding that respondent's petition to the New York State Court of Appeals for reconsideration of its denial for leave to appeal properly raised the issue of ineffectiveness of appellate counsel so as to permit federal review, denied respondent's application for a writ of habeas corpus.

The Second Circuit Decision

On appeal, the Court of Appeals for the Second Circuit reversed the district court and remanded the case with a direction that the writ be granted unless within ninety days respondent is assigned new counsel to prosecute his state court appeal.

The Court of Appeals held that the wilfull refusal of assigned counsel to raise colorable issues despite insistence from his indigent client to do so is a deprivation of the constitutional right to the assistance of counsel.

The Court of Appeals expressly based its holding on the uniform holdings of this Court that an indigent defendant is entitled to the assistance of counsel. See Pet App. at 10a citing Anders v. California, 386 U.S. 738, 744 (1967); Argersinger v. Hamlin, 407 U.S. 25 (1972); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963); Powell v. Alabama, 287 U.S. 45, 68-73 (1932).

Thus, contrary to petitioners' analysis (Pet. at 6-11), the Second Circuit decision "is not based on the 'reasonable competence' standard for evaluating attorney effectiveness, but rather is based on Anders v. California...." Pet. App. at 7a n.4 (citation omitted).

In addition, the Second Circuit explicitly followed the only other circuit court of appeals which has considered this issue. In strikingly similar circumstances, the Court of Appeals for the Ninth Circuit held that when an appellant urges counsel to make a non-frivolous appellate argument,

> [a]ppointed counsel...has a duty under Anders not only to raise such a non-frivolous argument, but to advocate it conscientiously on appeal.

High v. Rhay, 519 F.2d 109, 112 (9th Cir. 1975).

Importantly, the Second Circuit has not challenged the proposition that appellate counsel may exercise discretion in selecting issues to be raised on appeal. Specifically, the Court of Appeals observed:

> Nothing that we say here detracts from the proposition--unchallenged by Barnes--that appellate counsel has the authority to make decisions regarding strategies and tactics attendant to his representation, an authority flowing from recognition of counsel's professional training, experience, and well-informed judgment. See Ennis v. LeFevre, 560 F.2d 1072, 1075 (2d Cir. 1977), cert. denied, 435 U.S. 976, 98 S.Ct. 1625, 56 L.Ed.2d 70 (1978).

Pet. App. at 16a.

ARGUMENT

Petitioners thoroughly miscast the Second Circuit's decision by arguing, in effect, that appellate counsel has been deprived of his discretion to select issues to raise on appeal because he must raise every non-frivolous issue "suggested by the defendant." Pet. at 6. Premised on this analysis, petitioners urge that the Second Circuit has promulgated a new standard to

measure the "effectiveness" of counsel which conflicts both with the Second Circuit's prior decisions as well as standards established by other circuit courts of appeals. Petitioners' premise and conclusion are incorrect.

The legal principles which govern the decision herein have been well established by this Court and lower federal courts for over 50 years. It is the settled law of this Court that an indigent defendant is constitutionally entitled to the assistance of counsel. See Powell v. Alabama, 287 U.S. 45, 68-69 (1932); Gideon v. Wainwright, 372 U.S. 335 (1963); Douglas v. California, 372 U.S. 353 (1963).

Contrary to petitioners' analysis, the Second Circuit decided the narrow issue of when the appellate counsel's wilfull failure to perform contravenes the sixth amendment guarantee of the right to counsel. The Court of Appeals did not promulgate a standard of appellate competence; rather, the Court ruled that, on the facts of the case, assigned counsel's refusal to raise colorable issues*/ despite his indigent client's insistence violated the constitutional mandate of assistance of counsel.

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*/ Critical to the Second Circuit's decision--and unchallenged by the petitioners here or below--is the fact that substantial New York State case law supported the arguments respondent instructed his assigned lawyer to raise. Pet. App. at 13a-16a.

The Second Circuit's decision parallels this Court's opinion in Anders v. California, 386 U.S. 738 (1967). In Anders, the Supreme Court established the standards by which the right to full appellate review would be available to all defendants "who may not be able to afford such an expense." 386 U.S. at 743. This Court explained that

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae....His role as advocate requires that he support his client's appeal to the best of his ability.

386 U.S. at 744. The Anders Court explicitly rejected appointed-counsel's refusal to prosecute his client's appeal on the basis of his own view that the record was devoid of non-frivolous issues. This Court concluded that if upon an initial judicial review of "anything in the record that might arguably support the appeal" the appellate tribunal "finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." 386 U.S. at 744.

The refusal of appellate counsel in the case at bar to address colorable issues despite his indigent client's insistence impermissibly infringed upon the client's constitutional right to judicial review of his criminal conviction. Anders does not permit such a result. See also Entsminger v. Iowa, 386 U.S. 748 (1967).

The lower courts have been in accord. See, e.g., Robinson v. Wyrick, 635 F.2d 757, 758 (8th Cir. 1981); High v. Rhay, 519 F.2d 109 (9th Cir. 1975); Horsely v. Simpson, 400 F.2d 708 (5th Cir. 1968); United States ex rel. Maselli v. Reincke, 383 F.2d 129, 132 (2d Cir. 1967).

The precise issue involved in this case, viz., the constitutional duty of assigned counsel to raise colorable appellate issues upon instruction from his client was considered by the Ninth Circuit in High v. Rhay. There, counsel was assigned to appeal an indigent defendant's convictions of rape, sodomy and assault. The defendant specifically requested that his counsel raise seven additional claims to counsel's sole argument which assigned general error to the trial court's guilty verdict. After "due consideration," counsel refused. 519 F.2d at 112. The defendant filed a pro se supplemental brief and reply brief. Although the appellate court considered the merits of the defendant's brief and the "probabilities...that any review of the record, in light of all the arguments which diligent and experienced counsel may make for [the defendant] will still result in affirmance of the conviction," the Ninth Circuit reversed the district court's denial of a writ of habeas corpus. 519 F.2d at 113. Accordingly, the decision in High v. Rhay is virtually indistinguishable from the Second Circuit's decision herein. As in High v. Rhay, respondent specifically instructed his counsel to raise certain colorable issues on direct appeal. The refusal of counsel to do so in both cases constituted a deprivation of sixth amendment right of counsel and required a writ of habeas corpus to issue.

Petitioners contend that the Second Circuit has created a standard which is inconsistent with its prior decisions. Pet. at 7 n.4. Not only is this assertion explicitly contradicted by the Second Circuit's decision, but further, it fails to raise a significant issue which should be resolved by this Court pursuant to its discretionary review jurisdiction. See Supreme Court Rule 17. In essence, petitioners argue that the Second Circuit has created a standard to measure "effectiveness" of appellate counsel which is more stringent than its own "farce and mockery" standard applied to trial counsel. Pet. at 7 n.4. However, the Second Circuit unequivocally stated that its decision is not based on an "effectiveness" of counsel standard, but rather, is based on the sixth amendment guarantee of the assistance of counsel as enunciated in Anders v. California, 386 U.S. 738 (1967). Further, the Court acknowledged that its decision was consistent with its own 1977 decision in Ennis v. LeFevre, supra. Pet. App. at 16a.

Moreover, petitioners' effort to manufacture a split of authority among the circuit courts of appeals is equally unavailing. The Second Circuit has not developed an inconsistent standard by which to measure the effectiveness of appellate counsel. Rather, the Second Circuit considered the narrow facts in this case in holding that assigned counsel's refusal--not simple failure--to raise colorable issues failed to pass muster under the sixth and fourteenth amendments. None of the cases cited by petitioners is to the contrary.

Illustrative of petitioners' reliance on inapposite case law is their citation to Gillihan v. Rodriquez, 551 F.2d 1182 (10th Cir.), cert. denied, 434 U.S. 845 (1977) and Harshaw v. United States, 542 F.2d 455 (8th Cir. 1976). In neither case did the defendant instruct his counsel to assert a particular colorable issue on appeal. Similarly, in Gilbert v. Sowders, 646 F.2d 1146 (6th Cir. 1981), the Court of Appeals affirmed the grant of a writ of habeas corpus where appellate counsel's failure to meet technical filing requirements caused his indigent client's appeal to be dismissed. The issue of a client's insistence that his assigned counsel raise a specific colorable claim simply was not considered. Nor was the issue considered in Gustave v. United States, 627 F.2d 901 (9th Cir. 1980), where the Court of Appeals recognized the principle, unchallenged here, that an attorney need not raise "clearly untenable" issues. 627 F.2d at 906. See also Cerbo v. Fauver, 616 F.2d 714 (3d Cir.), cert. denied, 449 U.S. 858 (1980) (fact that appellate counsel did not raise an issue "recommended" by trial counsel analyzed in light of an effectiveness of counsel standard).

Far from signaling a threat to the foundation of federalism, the Second Circuit's decision simply reaffirms well established principles of the right to counsel. Moreover, contrary to the petitioners' argument, because challenges regarding effectiveness of counsel are cognizable in state proceedings*/, the Second Circuit's

*/ Thus, for example, respondent's sixth amendment challenge was raised in an application for leave to appeal to the state's highest court. See, e.g., People v. Gonzalez, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979); N.Y. Crim. Pro. L. §440.20 (McKinney's).

decision will no more inundate the federal courts with sixth amendment claims than would any other allegation of constitutional error resulting in incarceration.

Importantly, the Second Circuit does not challenge the premise that appellate counsel can exercise judgment in determining how to approach any given appeal. Through the normal course of attorney-client consultations, indigent clients will often be persuaded to follow the tactics and strategies formulated by experienced counsel. Nevertheless, when an indigent defendant, such as respondent, facing a prison term of seven and a half to fifteen years, specifically directs assigned counsel to raise a colorable legal issue, basic due process and sixth amendment principles require counsel to do so: the defendant neither has the skill and experience to research and raise the issues himself, nor does he have the funds necessary to retain a private attorney to present the issues for him. See also Code of Professional Responsibility, EC 7-7 & 7-8; Polk County v. Dodson, -- U.S. -- , 102 S.Ct. 445, 452 (1981)("Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy."); cf. ABA Project on Stds. for Crim. Justice, Criminal Appeals, Introduction ("Where a client insists upon adding frivolous contentions in a case containing other arguable points, counsel can present the case orally and in writing in a way that communicates the whole case without emphasis upon the weaker issues.")

The Second Circuit decision is not only consistent with precedent, but further, it is compelled by fundamental concepts of fairness. Certainly, an indigent defendant, just as a defendant able to afford private counsel, who faces a fifteen year maximum term should be afforded the assistance of counsel who will -- if so instructed -- raise any colorable issue which may result in a reversal.

CONCLUSION

It is respectfully submitted that petitioners have wholly failed to sustain their burden of establishing under Rule 17 that there are special and important reasons why the writ should be granted. The decision below is fully consistent with the uniform law of this Court; further, the Court of Appeals decided a federal question which does not conflict with the applicable decisions of any other Court of Appeals on the same matter. Accordingly, the writ should be denied.

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

----------x

UNITED STATES OF AMERICA ex rel. DAVID BARNES,

Respondent,

-against-

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,

Petitioners.

AFFIDAVIT OF MAIL SERVICE AND FILING

----------x

STATE OF NEW YORK)
) ss.:
COUNTY OF NEW YORK)

SHEILA GINSBERG, being duly sworn, deposes and says:

1. I am a member of the Bar of this Court and counsel to respondent David Barnes.

2. On May 17, 1982, I served the foregoing Application to Proceed in Forma Pauperis and Brief for Respondent in Opposition on Elizabeth Holtzman, District Attorney, Kings County, Municipal Building, 210 Joralemon Street, Brooklyn, New York 11201, attorney for petitioners by mailing a copy of the same with first-class postage prepaid to said address in accordance with Rule 28 (3) of the Rules of the Supreme Court.

3. On May 17, 1982, I filed the foregoing Application to Proceed in Forma Pauperis and Brief for Respondent in Opposition by mailing the same with first-class postage prepaid to the Clerk of this Court in accordance with Rule 28(2) of the Rules of the Supreme Court. The filing was timely made in that

respondent's time to file the opposition brief had been extended to May 17, 1982 pursuant to a letter dated April 23, 1982 from the Hon. Alexander L. Stevas, Clerk to the undersigned.

SHEILA GINSBERG

Sworn to before me this
17th day of May, 1982.

Notary Public

HELAINE KAMENOFF
Notary Public, State of New York
No. 41-4712370
Qualified in Queens County
Commission Expires March 30, 19[illegible]

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SUPREME COURT OF THE UNITED STATES

UNITED STATES OF AMERICA ex rel. DAVID BARNES,

Respondent,

-against-

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,

Petitioners.

APPLICATION TO PROCEED IN FORMA PAUPERIS

81-1794

TO THE HONORABLE THE CHIEF JUSTICE OF THE UNITED STATES AND THE ASSOCIATE JUSTICES OF THE UNITED STATES SUPREME COURT:

RESPONDENT, DAVID BARNES, respectfully seeks leave to proceed in forma pauperis without payment of fees and costs.

Counsel for Respondent certifies that in the proceeding below Respondent was represented by counsel assigned to him by the Second Circuit Court of Appeals pursuant to the Criminal Justice Act.

SHEILA GINSBERG
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Dated: May 12, 1982
New York, New York

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Petitioner's Reply Brief

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No. 81-1794

IN THE

Supreme Court of the United States

October Term, 1981

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and The State of New York,
Petitioner,

—against—

UNITED STATES OF AMERICA ex rel.
DAVID BARNES,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONER'S REPLY BRIEF

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PETITIONER'S REPLY BRIEF

ARGUMENT

I.

The Decision Of The Second Circuit Squarely Conflicts With The Decision Of The Third Circuit in *Cerbo v. Fauver*, 616 F.2d 714 (3rd Cir.), *cert. denied*, 449 U.S. 858 (1980).

The decision of the Second Circuit in this case creates a clear conflict in the circuits with respect to the constitutional duties of assigned appellate counsel in a

criminal case. The Second Circuit has held that the Constitution requires assigned appellate counsel to raise every nonfrivolous issue suggested by the defendant. In contrast, the Third Circuit squarely rejected that claim in *Cerbo* v. *Fauver*, 616 F.2d 714 (3rd Cir.), *cert. denied*, 449 U.S. 858 (1980).*

In *Cerbo*, a defendant had requested his assigned appellate attorney to raise a claim that certain recorded conversations should have been suppressed. The attorney failed to do so, and the Court of Appeals held there was no constitutional violation, despite the fact that the omitted claim had considerable merit.** In the instant case, by contrast, the omitted claims are unsupported by the evidence or the applicable state law. Indeed, the Court of Appeals had to strain to characterize them as colorable. Thus, the Third Circuit has rejected the rule announced in *Barnes*, even on a record more favorable to the *Barnes* rule than the *Barnes* record itself.

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* The Eighth Circuit in *Harshaw* v. *United States*, 542 F.2d 455 (8th Cir. 1976) and the Tenth Circuit in *Gillihan* v. *Rodriguez*, 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977), also held that an assigned appellate attorney need not raise on appeal every colorable issue, but in those cases it is not completely clear whether the defendant suggested the omitted claim of error. The Ninth Circuit in *Gustave* v. *United States*, 627 F.2d 901 (9th Cir. 1980), also held that an assigned appellate attorney need not raise on appeal every issue suggested by the defendant, but in that case it is not completely clear whether the rule extends to barely colorable issues as well as frivolous ones.

** In a collateral post-conviction proceeding, the New Jersey Supreme Court stated that had this issue been properly raised on direct appeal, a reversal of the conviction would have been warranted.

II.

No Other Court Of Appeals Has Ever Held That An Assigned Appellate Attorney Must Raise On Appeal Of A Criminal Conviction Every Nonfrivolous Issue Suggested By The Defendant.

Prior to the decision in the instant case, no Court of Appeals had ever held that an assigned appellate attorney must raise every nonfrivolous issue suggested by his client. The cases relied on by respondent are wholly distinguishable from the instant case, because they concern defendants who were totally denied appellate review of their convictions. In *High* v. *Rhay*, 519 F.2d 109 (9th Cir. 1975), the assigned attorney filed a four-page brief which contained no statement of the facts, a three-sentence argument which merely invited the appellate court to review the record to determine whether the defendant's guilt was proven beyond a reasonable doubt, and a list of seven issues suggested for appeal by the defendant. Thus, by his own assignment of error the attorney indicated that he did not consider the appeal frivolous.

The Ninth Circuit held that it was constitutional error for the assigned appellate attorney to file a brief that argued no issues, when the attorney believed there was at least one nonfrivolous issue. That Court did not rule on the obligation of the attorney to raise particular issues, whether or not suggested by the defendant, but only on the obligation to raise and conscientiously argue at least one nonfrivolous issue.

When a lawyer argues no issues at all, as in *High*, there is no occasion to consider whether, by the exercise of professional judgment, he might properly decline to raise weak claims in order to present stronger ones more effectively. This Court has recently indicated that such a

strategy is constitutionally acceptable.* In *Engle* v. *Isaacs*, — U.S. —, 50 U.S.L.W. 4376, 4383 (1982), this Court stated:

> Every trial presents a myriad of possible claims. Counsel might have overlooked or chosen to omit respondents' due process argument while pursuing other avenues of defense. We have long recognized, however, that the Constitution guarantees criminal defendants only a fair trial and a competent attorney. It does not insure that defense counsel will recognize and raise every conceivable constitutional claim.

In contrast, the Second Circuit has held that the Constitution prohibits assigned counsel from omitting any nonfrivolous claim suggested by the defendant. Neither the Ninth Circuit nor any other circuit has so held.

The other cases cited by respondent are even wider off the mark. In *Robinson* v. *Wyrick*, 635 F.2d 757 (8th Cir. 1981), defendant was denied effective assistance of counsel when his attorney failed to comply with the applicable procedural rules, resulting in a dismissal of the appeal without a ruling on the merits. In *Horsely* v. *Simpson*, 400 F.2d 708, 712 (5th Cir. 1968), defendant was denied effective assistance of counsel when his court-appointed counsel concluded that there was no merit in an appeal and refused to appeal defendant's conviction. In *United*

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* Respondent quotes some isolated language in *Polk County* v. *Dodson*, — U.S. —, 102 S.Ct. 445 (1981), suggesting a contrary result, but that language appears in the context of a discussion of the possible liability of a public defender under 42 U.S.C. § 1983. In holding that a public defender was not subject to suit under § 1983, the Court noted that a public defender's obligations were identical to those of a private attorney. *Id.* at 452. Neither a private nor a public attorney has the obligation to raise every barely colorable claim, and thereby undermine the effective presentation of strong claims.

States ex rel. Maselli v. *Reincke*, 383 F.2d 129, 132 (2d Cir. 1967), a defendant was denied effective assistance of counsel when he lost his right to an appeal due to his attorney's failure to inform him that he was entitled to appeal. In all these cases, appellate counsel presented no issues whatever to an appellate court. They are utterly unlike the instant case, where appellate counsel selected for appeal several issues that in his professional judgment were likely to prevail, and declined to present other less substantial issues.

III.

This Case Is Totally Unlike *Anders* v. *California*, 386 U.S. 738 (1967), And Its Progeny.

Respondent suggests that the Second Circuit in this case has not ruled on the standard for effective assistance of appellate counsel, but rather, has made a minor and uncontroversial application of the rule stated in *Anders* v. *California*, 386 U.S. 738 (1967).* The adroit use of doctrinal labels cannot eliminate the conflict in the circuits concerning the constitutional requirements for counsel's performance when his professional judgment leads him to present his strongest claims on appeal and to forego raising other claims. Despite the efforts of respondent and the Court below to characterize this as an *Anders* case, this case presents exactly the issue ordinarily considered under the label of "effective assistance of counsel".

In *Anders* this Court articulated a rule designed to protect a defendant against the possibility that he will be totally deprived of appellate review of his conviction. When counsel believes there are no nonfrivolous issues, *Anders* requires him nevertheless to present all possible

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* Even the Second Circuit stated that its decision was an "extension", rather than a mere application of the *Anders* rule. (Pet. App. 11a-12a).

claims of error for judicial scrutiny. In this case, unlike *Anders*, the issue of professional judgment arises. Counsel may conclude, as he did in this case, that it would be more effective to raise a few strong points than to clutter his brief with many barely colorable ones. The Second Circuit has held that the Constitution forbids that decision. That holding is not a mere extension of *Anders*, which guarantees a defendant some representation on appeal. Instead it regulates the character of the representation to which a defendant is entitled. In short, it states a standard for effective assistance of appellate counsel.

CONCLUSION

The Second Circuit has announced a constitutional standard for the performance of assigned appellate counsel that conflicts squarely with the rule of the Third Circuit and is unprecedented in the decisions of this Court or any other Court of Appeals. This Court should grant the writ of certiorari.

Dated: Brooklyn, New York
May, 1982

Respectfully submitted,

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In The

Supreme Court of the United States

October Term, 1982

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,
Petitioner,

—against—

UNITED STATES OF AMERICA *ex rel.* DAVID BARNES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE PETITIONER

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Question Presented

Whether, on appeal from a criminal conviction, the Sixth and Fourteenth Amendments to the United States Constitution require assigned appellate counsel to raise every nonfrivolous issue requested by the defendant.

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Opinions Below

The opinion of the court of appeals (Pet. App. 1a-24a) is reported at 665 F.2d 427 (2d Cir. 1981). The opinion of the district court (Pet. App. 25a-29a) is not reported.

Jurisdiction

The judgment of the court of appeals was entered on November 23, 1981, (J.A. 98), and a timely petition for rehearing with a suggestion for rehearing *en banc* was denied on January 25, 1982 (J.A. 99). The petition for a writ of certiorari was filed within 60 days of that date, on March 25, 1982, and was granted on June 7, 1982. The jurisdiction of this Court rests upon 28 U.S.C. § 1254(1).

Constitutional Provisions Involved

The Sixth and Fourteenth Amendments to the Constitution of the United States provide respectively, in pertinent part:

> In all criminal prosecutions, the accused shall enjoy the right to . . . have the Assistance of Counsel for his defense.

> No State shall . . . deprive any person of life, liberty, or property, without due process of law; or deny to any person within its jurisdiction the equal protection of the laws.

Statement

This is a case in which a defendant duly convicted by a state jury of robbery and other felonies, has unsuccessfully challenged that conviction in a direct state appeal, an application for state collateral review with attendant request to appeal, and a petition for a federal writ of habeas corpus review with attendant appeals. In this second petition for federal habeas corpus relief, he claims that he should be afforded still another opportunity to challenge his conviction in the state courts, claiming that on his first appeal his appointed counsel did not raise certain issues requested by the defendant. The district court dismissed the petition without a hearing, concluding from the state court record and other documents submitted by defendant that appellate counsel had satisfied not only the Second Circuit standard for effective assistance of counsel but also any other reasonable standard, and in particular that counsel had exercised reasonable professional judgment. The court of appeals reversed, holding that the Constitution requires appointed counsel to raise every nonfrivolous issue requested by a defendant, and finding that standard was violated here.

State Court Proceedings

A. The Trial

On March 15, 1976, David Barnes, hereinafter referred to as defendant, and three accomplices [1] robbed Richard Butts at knifepoint in the lobby of an apartment building, inflicting extensive injuries on him by means of a knife and fists, and forcibly removing his watch and money.

Mr. Butts recognized one of his assailants as defendant, whom he had known by the nickname "Froggy" for

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[1] The accomplices were never apprehended.

at least four years (T. 24-26).[2] Mr. Butts gave the nickname and a physical description to a Housing Authority Detective, who arrested defendant the next day (W. 20-21, 43; T. 70-71, 76-77).[3] Defendant was charged with three counts of robbery, two counts of assault and one count of grand larceny.[4]

Defendant testified in his own defense, against the advice of his trial counsel (T. 93-94). He testified to an alibi, stating that he was home with his father and girlfriend at the time of the robbery (T. 100).[5] He admitted that his nickname was "Froggy" and that he had attended the same school as Mr. Butts (T. 97, 99). He was cross-examined about three prior robbery convictions and about the fact that he was collecting welfare even though he was employed (T. 102-14, 122).

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[2] References preceded by "T" refer to pages of the trial transcript. References preceded by "W" refer to pages in the *Wade* hearing minutes.

[3] Mr. Butts identified defendant at a one-to-one confrontation in the hospital where Mr. Butts was confined for treatment of the injuries inflicted during the robbery. The identification procedure was the subject of a pre-trial hearing held on October 20, 1976. The presiding judge declined to rule on whether the identification procedure was suggestive, holding that the identification was in any event based upon an independent source, because Mr. Butts had been acquainted with defendant for a number of years before the robbery (W. 63-65). The out-of-court identification of defendant was not mentioned at trial.

[4] Defendant was indicted for First Degree Robbery (N.Y. Penal Law § 160.15[3]), two counts of Second Degree Robbery (N.Y. Penal Law § 160.10[1] and [2]), two counts of Assault in the Second Degree (N.Y. Penal Law § 120.05[2] and [6]) and Grand Larceny in the Third Degree (N.Y. Penal Law § 155.30[5]).

[5] Neither defendant's father nor his girlfriend testified at the trial. Defendant stated that the girlfriend was asleep at the relevant time (T. 100). The record does not indicate whether his father could or would have supported defendant's alibi if he had been called to testify.

Defendant also introduced evidence that a woman Mr. Butts said he went to visit was, according to school records, in school that day (T. 92).

Defense counsel submitted various requests to charge, including a request for a charge on accessorial liability. The trial judge declined to charge the jury in the specific language requested by defense counsel (T. 125-26, 188), but gave his own charge on the meaning of the term "acting in concert" and the prosecutor's burden of proving the requisite mental culpability beyond a reasonable doubt (T. 125, 174-77). The trial judge granted defense counsel's request for a charge on lesser included offenses, but then omitted the lesser counts at defendant's insistance (T. 126-27).[6]

On October 26, 1976, the jury convicted defendant of first and second degree robbery and second degree assault. On January 17, 1977, defendant was sentenced as a second felony offender, pursuant to New York Penal Law § 70.06, to an indeterminate term of imprisonment of seven and one-half to fifteen years.

B. The Direct Appeal

The Appellate Division of the Supreme Court of New York, Second Department, granted defendant permission to proceed with his appeal *in forma pauperis* and assigned Barry G. Rhodes, Esq., to prosecute the appeal. Almost three months later the Appellate Division relieved Mr. Rhodes and assigned Michael Melinger, Esq. (J.A. 24-25).

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[6] At the close of the prosecution's case, defense counsel negotiated a plea agreement with the prosecutor which included a promised sentence of one and one-half to three years incarceration. Defense counsel advised defendant that this agreement was in defendant's best interest, but defendant chose not to accept it (T. 91).

Mr. Melinger and defendant communicated by letter. Two letters from that correspondence are part of the record in this case (J.A. 26-28, 70). Defendant sent Mr. Melinger a copy of a *pro se* brief he had written some months earlier, raising four claims of error (J.A. 9-23). In the brief, defendant claimed, *inter alia*, that his assigned trial counsel was incompetent, in that he failed to investigate the alibi defense and some inaccuracies in the victim's testimony (J.A. 14-15, 17, 19-21). With this brief, defendant sent Mr. Melinger a letter listing several particular facts that he wanted to contest, and claiming again that his trial counsel was ineffective.[7]

In a letter dated November 9, 1977, Mr. Melinger replied that the suggested claims would not aid defendant in obtaining a new trial, and that they could not be raised on appeal because they were not based on evidence in the record.[8] He then listed seven potential claims of error

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[7] Defendant's letter is not in the record, but its contents and the fact that it accompanied his first *pro se* brief appear from Mr. Melinger's November 9th letter in response (J.A. 27).

[8] The federal court of appeals stated that counsel could have returned to the trial court in a *coram nobis* proceeding to supplement the trial record on appeal (Pet. App. 4a n.1). That statement is incorrect because under New York State law a *coram nobis* proceeding is actually a distinct and independent action by which a defendant may present claims of error which are outside the record of the trial. N.Y. Crim. Proc. Law § 440.10 (McKinney 1981). An application pursuant to Article 440 must be brought in the court in which the judgment of conviction was entered and the denial of the application cannot be appealed unless a certificate granting leave to appeal is issued by a judge of the appellate court. N.Y. Crim. Proc. Law §§ 440.10(1), 450.15 and 460.15.

Assigned appellate attorneys are not required or even encouraged to seek collateral relief by *coram nobis* or otherwise. *See* N.Y. County Law, Article 18B (McKinney 1972) and The Plan for Legal Defense Panel for Indigent Accused adopted by the several Bar Associations of New York City pursuant to that statute. Mr. Melinger was assigned pursuant to that statute (J.A. 24-25). New York State law does not provide an indigent defendant with appointed counsel in *coram nobis* proceedings.

which he was considering for inclusion in his brief and solicited defendant's "reflections and suggestions" with regard to these claims (J.A. 26, 28). There is no indication that defendant ever replied to this letter or indicated which, if any, of these seven issues he wanted raised on appeal.

Mr. Melinger submitted a brief on defendant's behalf to the Appellate Division on February 23, 1978 (J.A. 29-42), along with the *pro se* brief he had earlier received from defendant. Mr. Melinger's brief presented the facts in a manner favorable to defendant, highlighting every weakness in the prosecution's case, and raised three of the seven issues mentioned in the letter of November 9. The claims of error raised were: (1) the trial court improperly barred evidence of the victim's medical or psychiatric history; (2) the trial court erred in finding that Mr. Butts' identification of defendant was predicated upon an independent source; and (3) the trial court's cross-examination of defendant resulted in the denial of a fair trial. Counsel's discussion of the pertinent case law and numerous references to relevant sections of the transcript indicated his complete familiarity with defendant's trial and the legal issues.

Thereafter, defendant filed two more *pro se* briefs in the Appellate Division, raising three of the potential issues Mr. Melinger had listed in his letter of November 9 but had not included in his brief (J.A. 43-46, 47-52).[2] On May 4, 1978, Assistant District Attorney Sharen Litwin served and filed a brief in which she responded to all the points raised in Mr. Melinger's brief and defendant's

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[2] The seventh issue had already been raised in the first *pro se* brief, before the November 9 letter. (Defendant's first *pro se* brief, Points I and IV, J.A. 18-19, 23). Defendant's *pro se* briefs are dated September 6, 1977, February 24, 1978 and March 17, 1978. The second and third briefs raise three identical claims of error.

pro se briefs (J.A. 53-69). The case was argued that same day.[10] A schematic chart of all the issues addressed in the various documents is attached as Appendix I to this Brief.

On May 22, 1978, the Appellate Division affirmed the judgment of conviction without opinion, indicating that it had considered both Mr. Melinger's brief and defendant's *pro se* briefs in reaching its decision. *People v. Barnes*, 63 A.D.2d 865, 405 N.Y.S.2d 621 (2d Dept. 1978) (J.A. 71). The New York Court of Appeals denied leave to appeal to that court on July 20, 1978. *People v. Barnes*, 45 N.Y.2d 786 (1978) (J.A. 72).

Federal Court Proceeding

On August 8, 1978, defendant filed an application for a writ of habeas corpus in the United States District Court for the Eastern District of New York. He raised five claims of error, including a claim that he was deprived of effective assistance of counsel at trial.

In a Memorandum and Order dated November 27, 1978, the Honorable Eugene H. Nickerson held that defendant's claims were without merit and dismissed the petition (Appendix II to this Brief). With regard to defendant's claim that he was denied effective assistance of trial counsel the court stated that "trial counsel appears to have been well prepared and a vigorous advocate on behalf of his client." Judge Nickerson found "no indication" in the transcript that trial counsel "was unfamiliar with the case." (Appendix II at 13a-14a).

On May 10, 1979, the Court of Appeals for the Second Circuit affirmed without opinion, 607 F.2d 994 (2d

[10] Thus defense counsel cannot be faulted for failing to send defendant a copy of the prosecutor's brief before the oral argument, because the brief was served and filed on the day of argument.

Cir. 1979). This Court denied defendant's *pro se* petition for a writ of certiorari on October 1, 1979. *Barnes v. Jones*, 444 U.S. 853 (1979).

Further State Court Proceedings

Defendant then made two more efforts to challenge his conviction in state court. On March 4, 1980, he filed a motion in the trial court for collateral review of his sentence, which was denied on April 28, and leave to appeal that decision was denied on October 3. And on March 31, 1980, almost two years after the New York Court of Appeals had denied leave to pursue his direct appeal to that Court, he asked for reconsideration of his application, claiming for the first time that his state appellate counsel had provided ineffective assistance.[11]

In support of his application, he cited a 1979 New York case, *People v. Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979), which holds that a claim of ineffective assistance of appellate counsel may in some circumstances be raised for the first time in an application for leave to appeal to the New York Court of Appeals. The New York Court of Appeals denied defendant's application on April 16, 1980. *People v. Barnes*, 49 N.Y.2d 1001 (1980) (J.A. 73).

Further Federal Court Proceedings

Defendant then returned to federal court, filing as a second application for federal habeas corpus relief essentially the same document he had filed with the New York Court of Appeals (J.A. 74-91). This second application underlies the action before this Court. In this application he claimed that his state appellate counsel

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[11] This application is almost identical to the second petition for a federal writ of habeas corpus, reproduced at J.A. 74-91.

had provided ineffective assistance. Defendant contended that his assigned appellate counsel's brief was actually a "no-merit" brief because it did not advance every claim of error contained in defendant's *pro se* briefs, in defendant's letters to counsel and in the list of potential appellate issues found in counsel's letter to defendant.

By a Memorandum and Order dated January 29, 1981, Judge Nickerson denied defendant's application, concluding that the performance of his appellate counsel violated neither the "farce and mockery" standard, "nor any other standard which could reasonably be applied." (Pet. App. 28a). The court reasoned that it is counsel's "professional duty to choose among potential issues, according to his judgment as to their merit and his tactical approach." (Pet. App. 28a-29a).

The United States Court of Appeals for the Second Circuit assigned Sheila Ginsberg Riesel, Esq., as counsel to prosecute the appeal. On that appeal, defendant for the first time specified five issues that he now claims appellate counsel should have raised: that the trial court failed to give an adequate charge on accessorial liability, and that trial counsel provided ineffective assistance in four respects. The court of appeals agreed, and reversed the district court, ordering the issuance of a writ of habeas corpus within a reasonable time, not to exceed ninety days, unless defendant was assigned counsel and granted a new state appeal. *Barnes v. Jones*, 665 F.2d 427 (2d Cir. 1981) (Oakes, J.) (Pet. App. 1a-18a).

The court held that defendant had been denied effective assistance of appellate counsel because his attorney failed to raise on appeal every nonfrivolous issue requested by defendant.[12] The court reached this conclusion

[12] The district court and the court of appeals both held that the application for reconsideration to the New York Court of

[Footnote continued on following page]

by extending the holding of *Anders v. California*, 386 U.S. 738 (1967). *Anders* requires assigned counsel to argue all nonfrivolous appeals. The court of appeals held that it also requires assigned counsel to argue all nonfrivolous issues requested by a defendant.

Judge Meskill filed a dissent rejecting the majority's novel extension of *Anders* and noting further that the record does not support the conclusion that defendant insisted that his attorney raise particular issues (Pet. App. 21a-22a). He went on to review counsel's performance and found that counsel "studied the trial record, considered several potential grounds for appeal, communicated his opinions to his client requesting thoughts and suggestions, and filed a skillfully drafted brief which set forth the factual and legal bases of the claims that, in his professional judgment, he considered viable" (Pet. App. 22a).

The court denied a timely petition for rehearing and rehearing *en banc*, on January 25, 1982, with Judge Meskill again dissenting (J.A. 99). The court of appeals has stayed its mandate pending review in this Court. Petitioner's application for a writ of certiorari was granted on June 7, 1982. Defendant is presently incarcerated.

Appeals satisfied the statutory requirement of exhaustion of state remedies as to the issue of the effectiveness of defendant's appellate counsel. 28 U.S.C. § 2254(b), (c). While an application to the Appellate Division for reargument of the appeal may have been a more appropriate means of presenting the claim to a state court, the procedure followed by defendant is authorized by New York State law, *People v. Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979), and was therefore found by the courts below to be an acceptable method for exhausting state remedies.

Summary of Argument

The Court of Appeals for the Second Circuit held that the sixth and fourteenth amendments require assigned appellate counsel to present every nonfrivolous issue requested by a defendant. By its decision, the court of appeals has established a standard for the performance of appellate counsel which will undermine rather than promote effective representation of indigent defendants on appeal. This standard has no basis in the Constitution and threatens to interfere substantially with the orderly administration of the appellate process.

In order to provide reasonably competent representation, appellate attorneys must be allowed to select issues for presentation to an appellate court in accordance with their professional judgment. The rule stated by the court of appeals in this case prohibits the exercise of professional judgment. This rule will result in lengthy briefs cluttered with numerous barely arguable claims of error. Such briefs may well distract the attention of an appellate court from a truly meritorious claim. This approach to appellate advocacy is contrary to the defendant's best interest.

Moreover, the court of appeals incorrectly applied to this case the rule stated in *Anders v. California*, 386 U.S. 738 (1967). In *Anders*, this Court held that an assigned appellate attorney must argue all nonfrivolous appeals. In this case defendant's assigned appellate counsel seriously considered numerous potential claims of error and ultimately presented those claims which, in his professional judgment, were best supported by the record and the applicable law. The court of appeals held that *Anders* requires assigned counsel to raise every nonfrivolous issue requested by the defendant. Thus, in the view of the court below, the conscientious determination made by counsel in this case is constitutionally prohibited.

No court has found any fault with the performance of defendant's appellate counsel under traditional standards for evaluating effective assistance, nor could the record support such a finding. Counsel reviewed the record, considered numerous ideas for possible claims on appeal, and finally selected the three claims that seemed to him most likely to prevail. He exercised excellent professional judgment in deciding to limit the number of claims, and in selecting appellate issues.

While the court of appeals faults counsel for not yielding to defendant's requests to raise several specific issues, no such request can be found in the record. The court relies on the fact that defendant chose to supplement his counsel's work by filing several *pro se* briefs. But those briefs, signed by defendant as co-counsel to his assigned counsel, do not constitute a request to raise the issues contained in them. The court also relies on the fact that counsel wrote a letter to defendant identifying a number of potential issues for appeal, and then omitted some of those issues from his brief. But that letter from counsel to defendant does not constitute a request from defendant to counsel. In short, the court has constructed defendant's "request" from whole cloth.

In any event, the omitted issues were frivolous, or at best barely colorable. Defendant's inability to demonstrate that he suffered any prejudice by the omission of the claims compels the conclusion that the court of appeals erred in granting the writ of habeas corpus.

ARGUMENT

In 1955, this Court held that a state may not grant appellate review of criminal convictions in a way that discriminates against some convicted defendants because of their poverty. *Griffin v. Illinois*, 351 U.S. 12, 18 (1955). If the state provides appellate review as of right, it must

also provide an indigent defendant with the tools to make appellate review meaningful. In particular, the equal protection and due process clauses of the fourteenth amendment require the state to provide an indigent defendant with a free trial transcript, *id.*, and with court-appointed counsel to prosecute the appeal. *Douglas v. California*, 372 U.S. 353 (1963). Court-appointed counsel must act with reasonable competence, *Rodriquez v. United States*, 395 U.S. 327 (1969), must act as a genuine advocate for the defendant, and must pursue the appeal so long as it is not wholly frivolous. *Anders v. California*, 386 U.S. 738 (1967).

Defendant in this case plainly had the assistance of competent and effective counsel in prosecuting his appeal. The district court expressly found that his counsel was effective by any reasonable standard, and the court of appeals did not fault his performance by generally prevailing standards. Counsel reviewed the case with defendant, considered defendant's complaints about the trial, formulated numerous issues for possible use on appeal, and ultimately presented to the court the three issues he reasonably believed most likely to succeed. The court of appeals faulted counsel only for failing to fulfill an additional requirement, announced for the first time in this case. The court below held that to satisfy constitutional standards, court-appointed counsel must raise on appeal every nonfrivolous issue requested by the defendant.

Point I of this Brief argues that there is no basis for such a requirement in the Constitution, and that no sound policy considerations support it. Point II argues that there is, in any event, no basis in the record for the determination that appellate counsel in this case violated either the Second Circuit's new rule or any other standard for measuring the effectiveness of appellate counsel. Point III argues that if any constitutional rule was arguably violated here, defendant has shown no prejudice.

I. The Constitution Does Not Require Court-Appointed Appellate Counsel To Raise On Appeal Of A Criminal Conviction Every Nonfrivolous Issue Requested By The Defendant.

The court of appeals in this case held that the Constitution requires court-appointed counsel on appeal of a criminal conviction to raise every nonfrivolous issue requested by the defendant. That ruling is fundamentally misconceived, and would undermine the effective representation of indigent defendants on appeal, rather than protecting their right to a meaningful appeal.

The court below mistakenly characterized its rule as a simple extension of the fourteenth amendment right to counsel on appeal articulated in *Douglas v. California*, 372 U.S. 353 (1963) and *Anders v. California*, 386 U.S. 738 (1967).[13]

In *Anders* this Court articulated a rule designed to protect a defendant against the possibility that the defendant will be totally deprived of appellate review of a conviction. When counsel believes there are no nonfrivolous issues, *Anders* requires counsel nevertheless to

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[13] While invoking the sixth amendment right to counsel and using the language of "effective assistance of counsel" the court of appeals ultimately declared that its rule was based not on the sixth amendment but on the fourteenth. That distinction is important for the Second Circuit because that Circuit has steadfastly clung to an especially undemanding standard for measuring the effective assistance of trial counsel under the sixth amendment. *United States v. Bubar*, 567 F.2d 192, 201-202 (2d Cir.), *cert. denied*, 434 U.S. 872 (1977); *Rickenbacker v. Warden*, 550 F.2d 62, 66 (2d Cir. 1976), *cert. denied*, 434 U.S. 826 (1977). Thus, by attributing to its new rule an entirely distinct lineage the Second Circuit has imposed on appellate counsel a more stringent standard than that of any other circuit, while retaining for trial counsel the "farce and mockery" standard which has been abandoned by all other circuits.

present all possible claims of error for judicial scrutiny. In this case, unlike *Anders*, the issue of professional judgment arises. Counsel may conclude, as he did in this case, that it would be more effective to raise a few strong points than to clutter his brief with many barely colorable ones. By its holding that the Constitution forbids that decision, the Second Circuit has interfered with professional judgment in a way that the *Anders* rule does not.

The Second Circuit mistakenly held that *Anders* applies not only to a case as a whole but to particular issues within a case. Thus it drew heavily on *High v. Rhay*, 519 F.2d 109 (9th Cir. 1975). But *High* v. *Rhay* concerns a defendant who was totally denied appellate review of his conviction. In that case, the assigned attorney filed a four-page brief which contained no statement of the facts, a three-sentence argument which merely invited the appellate court to review the record to determine whether the defendant's guilt was proven beyond a reasonable doubt, and a list of seven issues suggested for appeal by the defendant. Thus, by his own assignment of error the attorney indicated that he did not consider the appeal frivolous.

The Ninth Circuit held that it was constitutional error for the assigned appellate attorney to file a brief that argued no issue, when the attorney believed there was at least one nonfrivolous issue. That court did not rule on the obligation of the attorney to raise particular issues, whether or not suggested by the defendant, but only on the obligation to raise and conscientiously argue at least one nonfrivolous issue.

When a lawyer argues no issues at all, as in *High*, there is no occasion to consider whether, by the exercise of professional judgment, he might properly decline to raise weak claims in order to present stronger ones more

effectively. The judgment of High's attorney was not in any event assisting his client, and there was no harm to the defendant in overruling the lawyer's judgment.

When, on the other hand, a lawyer carefully reviews the possible appellate issues and selects the most promising for presentation to the appellate court, the lawyer exercises professional judgment to benefit the client. Any rule that requires the lawyer to raise additional issues interferes with that judgment and tends to undermine rather than to promote the effective assistance of counsel.[14]

Perhaps the most important task of appellate advocacy is to distill legal issues from the relative disorder of a trial record, and to select the most promising issues for presentation to an appellate court. The defendant can play an important role in identifying problems that arose during the trial, but counsel must transform the defendant's complaints and the record of the trial into a few discrete and manageable issues.

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[14] The ABA Standards for Criminal Justice, cited by the court of appeals, clearly recognize the distinction between the decision whether to pursue an appeal at all, and the decision whether to press particular issues on appeal. The Standards state that the decision whether to appeal should be made by the client, like the decision what plea to enter, whether to waive jury trial, and whether to testify on his or her own behalf. The Defense Function Standards 4-5.2, 4-8.2; Criminal Appeals Standard 21-1.1 (1980). *See also* Model Code of Professional Responsibility EC 7-7 (1979). By contrast the Standards state that strategic and tactical decisions should be made by counsel after consulting with the client. The Defense Function Standards 4-5.2, 4-8.2. The selection of issues on appeal is strategic and tactical, like the decision which witnesses to call and what trial motions should be made, and therefore it is a decision to be made by counsel. *See* The Defense Function Standard 4-8.3 and commentary at 4-111. *See also* Model Rules of Professional Conduct Rule 1.2 and accompanying commentary (Proposed Final Draft, May 30, 1981).

It is generally much more effective to present an appellate court with a small number of strong and well-focused issues, than to present a long list of varied and overlapping claims. In THE COMMON LAW TRADITION, Professor Llewellyn instructs appellate attorneys to refrain from raising numerous points in their briefs because such an approach will "manage only to scatter and waste their fire, to destroy all impact and unity of drive." Karl N. Llewellyn, THE COMMON LAW TRADITION, 238 (1960). Similarly, the standard practitioners' handbook for appeals to the Second Circuit instructs: "[A] brief which treats more than three or four matters runs serious risks of becoming too diffuse and giving the overall impression that no one claim of error can be serious." Committee on Federal Courts of the Association of the Bar of the City of New York, APPEALS TO THE SECOND CIRCUIT 38 (1980).

Courts often impose page limits on appellate briefs, and time limits on oral arguments. *See, e.g.*, Rules of the Supreme Court of the United States, Rule 34(3) (page limits) and Rule 38(3) (time limits); McKinney's 1981 New York Court Rules, Appellate Division, Second Department, § 670.17(g)(2) (page limits) and § 670.22 (time limits). If counsel is required to expend limited space and time on relatively insubstantial claims, there may be inadequate space and time for effective presentation of the truly meritorious claims.

The rule announced by the court of appeals in this case reduces counsel to a mere translator whose task is to put in legal language and proper form every complaint defendant may have about the trial that resulted in his conviction, screening out only the utterly frivolous complaints. That rule denigrates the role of counsel. It would be intelligible only if appointed counsel were generally untrustworthy, incompetent, or unethical. Fortunately, there is no basis whatever for so dismal a view of the defense bar. If there were, then the situation

would call for measures far more drastic than those taken by the Second Circuit in this case.

Assigned counsel's treatment of the defendant's suggestions in this case illustrates the importance of the exercise of professional judgment in the selection and transformation process. For example, the defendant was particularly eager to attack what he said were inaccurate statements by the victim about numerous collateral facts. At various times defendant blamed this problem on the trial court, or on ineffective trial counsel. Appellate counsel quite properly concluded, however, that there was not much hope of correcting this problem on appeal because to do so would require evidence outside the record.

Similarly, the defendant was particularly unhappy about the hospital showup at which he was identified by the victim, but his counsel properly reformulated the issue as a challenge to the in-court identification, because evidence of the hospital showup was never introduced at trial.

Other claims of error originated with appellate counsel rather than with defendant. Thus, for example, appellate counsel first formulated the claim that evidence of the victim's medical or psychiatric history was improperly excluded. If there were error, it could have been attributed either to the court or to defense counsel. A large part of appellate counsel's task was to find the most promising legal characterization of the faults he found in the trial. Appellate counsel characterized the issue as an error of the trial court in excluding the evidence. The court of appeals now faults him for failing to characterize it instead as an error of counsel in failing to show the relevance of the evidence. Such decisions, however, are the essence of professional judgment. The decision made by appellate counsel here can hardly be characterized as

constitutionally defective, and should not be second-guessed by a reviewing court.

No other court has ever held that an assigned appellate attorney must raise every nonfrivolous issue requested by the client, contrary to the attorney's own considered professional judgment. The Third Circuit squarely rejected that claim in *Cerbo v. Fauver*, 616 F.2d 714 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980). In *Cerbo*, a defendant had requested his assigned appellate attorney to raise a claim that certain recorded conversations should have been suppressed. The attorney failed to do so, and the court of appeals held that there was no constitutional violation, despite the fact that the omitted claim had considerable merit.[15] Three other courts of appeals have also seemingly rejected the rule adopted by the Second Circuit.[16] The Second Circuit stands alone in requiring assigned appellate counsel to suppress professional judgment and to raise every nonfrivolous issue requested by the defendant.

The rule adopted by the Second Circuit cannot be justified as a method of providing substantial equality

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[15] In a collateral post-conviction proceeding, the New Jersey Supreme Court stated that had this issue been properly raised on direct appeal, a reversal of the conviction would have been warranted. *State v. Cerbo*, 78 N.J. 595, 600, 397 A.2d 671, 673-674 (1979).

[16] The Eighth Circuit in *Harshaw v. United States*, 542 F.2d 455 (8th Cir. 1976) and the Tenth Circuit in *Gillihan v. Rodriguez*, 551 F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977), also held that an assigned appellate attorney need not raise on appeal every colorable issue, but in those cases it is not completely clear whether the defendant suggested the omitted claim of error. The Ninth Circuit in *Gustave v. United States*, 627 F.2d 901 (9th Cir. 1980), also held that an assigned appellate attorney need not raise on appeal every issue suggested by the defendant, but in that case it is not completely clear whether the rule extends to barely colorable issues as well as frivolous ones.

between indigent defendants and those who can afford to retain counsel. Defendant made that argument below (Defendant's Brief 24-28), but it depends for its persuasive power on a gross distortion of the attorney-client relationship in the case of both court-appointed and retained counsel. The argument seriously overstates the paying client's control over retained counsel, and it also understates the power of the indigent defendant to obtain representation the defendant finds satisfactory.

First, it is seldom practical for a paying client to override counsel's judgment and insist that particular issues be raised on appeal. Many lawyers will not work under such constraints, and thus a defendant who wants the skills of a particular lawyer must accede to that lawyer's strategic judgments. Moreover, a defendant who has already invested substantial amounts of time, information, and money in a relationship with one lawyer cannot so easily replace that lawyer in order to find another who will agree to raise particular issues on appeal. Finally, if the defendant first becomes dissatisfied close to the time when briefs or arguments are scheduled, the court may be unwilling to grant the postponement that would be necessary to permit new counsel to enter the case. Thus, a paying client's power to control retained counsel is surely limited by practical considerations, and equality for indigent clients does not demand a rule that gives them total control over their lawyers' choice of appellate issues.

Second, the indigent defendant has under existing law some opportunity to change counsel if the defendant is dissatisfied. The rules governing the appointment of counsel for indigent defendants in New York City provide that "an appellate court may, at any point in the appellate proceedings, substitute one appointed counsel from the panel for another." Legal Defense Plan for Indigent Accused, Art. IV, para. C., subd. 3, reprinted in Appendix III to this brief. Under New York law, and

under comparable federal law, counsel will be relieved and substitute counsel will be appointed if good cause can be shown why new counsel is needed.[17] *People v. Sawyer*, No. 401, slip op. (N.Y. Ct. App. July 2, 1982); *United States v. Burkeen*, 355 F.2d 241, 245 (6th Cir.), *cert. denied*, 384 U.S. 957 (1966); *United States v. Curtiss*, 330 F.2d 278, 280 (2d Cir. 1964). Good cause exists if there is a genuine conflict between the interests of the attorney and the client, or if the attorney is incompetent, or if "a personal impediment . . . handicaps his or her professional performance" and prevents the attorney from providing effective assistance to the defendant. *People v. Sawyer*, *supra* at 6. A complete breakdown in the attorney-client relationship may also be a basis for substitution of counsel, if the defendant can articulate the reason for the lack of confidence. *People v. Medina*, 44 N.Y.2d 199, 208, 375 N.E.2d 768, 772-73, 404 N.Y.S.2d 588, 593 (1978).

In practice, courts respond to such requests with a flexible standard, granting substitution more readily if it will not cause a delay, than if it will. It is plain that an indigent defendant who is dissatisfied with appointed counsel is not totally without recourse.

In this case, defendant never sought to replace his counsel, nor did he ever register any complaint about the appellate lawyer's performance until nearly two years after the conviction was affirmed. Immediately after the conviction was affirmed, defendant had sufficient confidence in his appellate lawyer to request him to continue the representation. He asked his counsel to seek discre-

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[17] Indeed in this case defendant's first assigned appellate counsel, Barry G. Rhodes, Esq., was relieved and new counsel was appointed (J.A. 24-25).

tionary review in the New York Court of Appeals.[18] Defendant then proceeded to seek review of his conviction through a petition for a federal writ of habeas corpus and attendant appeals, and a petition for state collateral review, without ever mentioning any dissatisfaction with his appellate lawyer. Only when all those efforts had failed did defendant register his first complaint about the performance of his appellate lawyer. That complaint appeared in his belated effort to reopen his petition for discretionary review in the New York Court of Appeals, and then shortly afterward in the second petition for a federal writ of habeas corpus that underlies this litigation. The record hardly supports the claim that this indigent defendant was so dissatisfied with his lawyer that had he been a paying client he would have retained new counsel to prosecute his appeal.

No special rule is required to regulate the performance of court-appointed attorneys. Whether appointed or retained, counsel must satisfy the same standards of constitutional adequacy. *Cuyler v. Sullivan*, 446 U.S. 335 (1980) (trial counsel); *Rodriquez v. United States*, 395 U.S. 327 (1969) (appellate counsel). Both appointed and retained counsel owe the same fiduciary duties to their clients, the same ethical obligations to the judicial system, and the same professional obligation to exercise independent professional judgment. *Polk County v. Dod-*

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[18] Rule 500.8(a) of the Rules of the New York Court of Appeals provides that attorneys "assigned at the Appellate Division or other intermediate appellate courts are required by rules of those courts to make the application [for leave to appeal] if defendant requests. Otherwise the application must be made by retained counsel or by the appellant, *pro se*." Thus, defendant's assigned counsel could not have applied for leave to appeal to the New York Court of Appeals except upon defendant's request.

son, 102 S. Ct. 445, 449-450, 452 (1981).[19] Neither appointed nor retained counsel should be required to abandon professional judgment and raise every nonfrivolous issue requested by the defendant. Both should be required to provide the effective assistance of a reasonably competent attorney.

II. Defendant's Appellate Counsel Satisfied Any Reasonable Standard Of Effective Assistance Of Counsel. Moreover, None Of The Omitted Claims Had Merit And None Was Requested By The Defendant.

No court has found any fault with the performance of defendant's appellate counsel under traditional standards for evaluating effective assistance. The district court found that counsel's performance not only avoided making a "farce and mockery of justice", but also measured up to ordinary standards of reasonable professional competence (Pet. App. II 28a). The court of appeals did not question that finding, nor could it have done so.

The record shows that appellate counsel reviewed the record with care, and also reviewed a proposed *pro se* brief and letters from defendant elaborating numerous complaints about the trial. Counsel considered and eval-

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[19] In *Polk County* this Court held that a public defender does not act under color of state law when performing the functions of an attorney assigned to represent an indigent defendant in criminal proceedings. In this context this Court stated that, "[a]lthough a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy." *Id.* at 452. This statement should be limited to the context in which it was made because in *Polk County* this Court was not presented with the question of whether an assigned appellate attorney could omit a nonfrivolous claim in order more effectively to advocate stronger grounds for reversal.

uated defendant's ideas, and then identified and presented to his client seven additional ideas for possible claims on appeal. Finally, after further reflection counsel selected the three claims that seemed to him most likely to impress the appellate court.

The three issues raised on appeal by counsel attacked the three major aspects of the prosecutor's case. First, counsel challenged the identification testimony of the robbery victim. Second, he challenged the exclusion from evidence of medical or psychiatric records that might have impeached the victim's credibility. Third, he challenged the trial judge's participation in cross-examining the defendant. While none of these claims ultimately prevailed, counsel could reasonably have believed that they presented the strongest chance for reversal, and that the case would be weakened by adding a multitude of other, less substantial claims.

The court of appeals now faults counsel for failing to raise five additional claims. Four of these are aspects of the claim that trial counsel was ineffective, in violation of defendant's sixth amendment rights. The fifth is an objection to the jury charge. The court characterizes each of these as a nonfrivolous claim requested by the defendant, but the court is wrong on both counts.

Each of the omitted issues had little or no merit, and would have distracted the appellate court from more substantial issues. Thus, in deciding to omit those issues, counsel in no way departed from the standard of reasonable professional competence.

Moreover, as Judge Meskill noted in dissent below, the record does not support the conclusion that defendant requested, much less insisted, that his counsel raise any of these issues. The court constructs this "request" out of whole cloth. First the court relies on the fact that defendant chose to file several *pro se* briefs. Defendant

never expressed any dissatisfaction with his counsel's work. He merely chose to supplement that work by filing three *pro se* briefs. The first of these was drafted long before appellate counsel entered the case. The second and third briefs,[20] filed after appellate counsel's brief, do not renew any of the points made in the first brief, and thus cannot be read to criticize counsel for failing to raise those original five claims. They simply add three new claims, from among the four that counsel mentioned in his letter and then discarded from his brief. The filing of *pro se* briefs, signed by defendant as co-counsel to appointed counsel, does not constitute a request to counsel to raise the points that appear in the *pro se* briefs.

The court also relies on counsel's letter of November 9 to show that defendant made a specific request. While it appears from counsel's letter that defendant made some suggestions, he did not suggest any of the issues identified by the court of appeals.[21] One of those issues appears in the letter, but not as a suggestion from defendant. Instead, it was proposed by counsel as a possible issue, and later abandoned by him. It cannot fairly be said that when counsel proposes and then rejects an idea for an issue on appeal, that somehow constitutes a request from defendant to his counsel to raise the issue. The letters from counsel to defendant represent the work of a careful and solicitous attorney providing effective assistance of counsel. They do not represent requests or demands on the part of the defendant.

Defendant himself did not object to the omission of issues until long after his conviction was affirmed and his

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[20] The third *pro se* brief is merely a rewritten version of the second.

[21] Defendant's claim of ineffective assistance of trial counsel, as it appears in his first *pro se* brief and letters to counsel (App. I 1a, J.A. 19-21, 27), bears little resemblance to that claim as it was articulated by the court of appeals (Pet. App. 13a-15a).

first application for a federal writ of habeas corpus was denied. His complaints about appellate counsel's failure to raise particular issues appear for the first time in his 1980 application to the New York Court of Appeals for reconsideration of his application for discretionary review, in his subsequent second petition for a federal writ of habeas corpus, and in his appeal to the court of appeals from the denial of that petition.

Thus, none of the issues identified by the court of appeals is nonfrivolous, and none was requested by the defendant. Each claim will be examined in turn.

A. The Claim That Trial Counsel Was Ineffective In That He Failed To Prepare Or Investigate The Case.

The court of appeals held that appellate counsel should have claimed that trial counsel was ineffective in that he failed to investigate or prepare the case adequately. This claim was wholly frivolous on appeal, because if there were any merit to it at all, it would have required matter outside the record to establish the claim. On the record, it appears that trial counsel vigorously cross-examined the prosecution witnesses and sought to impeach them, drawing on some independent investigation of the facts reported in their testimony. Defense counsel obtained the report of the arresting officer's partner and used it to cross-examine the arresting officer as to the descriptions of the robbers given by the victim soon after the robbery (W. 47, T. 79). Defense counsel also obtained the medical records of the victim (T. 58), and the school records of the victim's friend and used them to challenge victim's credibility (T. 92). No failure to investigate appears on the record, and thus any claim based on that premise was doomed to failure.[22]

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[22] Relief on this theory, if any, could have been obtained only by collateral attack on the conviction, and even then it was not

[Footnote continued on following page]

The court of appeals is mistaken not only in characterizing the claim as colorable,[23] but also in stating that defendant urged his counsel to make the claim. Defendant raised it himself, in the *pro se* brief that he drafted before he had counsel, and he sent that brief to his counsel. When counsel correctly noted that the claim lacked support in the record, and for that reason declined to raise it, defendant did not press the point. Defendant did not review the claim in his second or third *pro se* briefs, nor did he otherwise renew the suggestion that counsel raise the point. He next raised it on his first petition for federal habeas corpus relief, where the claim was jurisdictionally proper, though substantially lacking in merit. There is no support in the record for the conclusion of the court of appeals that defendant instructed his appellate lawyer to raise this claim.

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warranted. Defendant raised the claim in his first petition for federal collateral review, where it was flatly rejected by both the district court and by the court of appeals. *Barnes v. Jones*, No. 78-C-1717 (E.D.N.Y. Nov. 28, 1978) (App. II to this Brief), *aff'd*, 607 F.2d 994 (2d Cir.), *cert. denied*, 444 U.S. 853 (1979). Thus it is somewhat ironic that the court of appeals now characterizes this claim as nonfrivolous.

While the court of appeals was correct in noting that the Second Circuit and the New York Court of Appeals articulate their respective standards for the evaluation of the effectiveness of counsel in different language, (Pet. App. 6a n.4, 13a-14a), it is unlikely that the presentation of this claim to the New York courts would have resulted in setting aside the conviction. The New York courts did not articulate the relatively liberal rule of *People v. Bell*, 48 N.Y.2d 933, 401 N.E.2d 180, 425 N.Y.S.2d 57 (1979) and *People v. Aiken*, 45 N.Y.2d 394, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978), cited by the Second Circuit, until after defendant's conviction was affirmed by the Appellate Division. Moreover, even under that more liberal rule, his challenge to trial counsel's performance would have little chance of success.

[23] The court of appeals used the terms "colorable" and "nonfrivolous" interchangeably, Pet. App. 11a, and that usage is followed here.

B. The Claim That Trial Counsel Was Ineffective In That He Failed To Call Defendant's Father As A Witness.

The court of appeals also held that appellate counsel should have claimed that trial counsel was ineffective in that he failed to call defendant's father as an alibi witness. This claim was frivolous on appeal for much the same reason as the previous claim. If there was any merit to the claim, matter outside the record would have been necessary to support it. There is nothing in the record to show that the father was available as a witness, or that he was willing and able to support defendant's alibi.[24] Trial counsel might have had good reason for refraining from calling the father as a witness.

Defendant apparently knew there were good reasons for not calling his father, because he never at any time urged appellate counsel to argue that trial counsel should have called the father as a witness. That claim does not appear in any of defendant's *pro se* briefs, or in his letter to appellate counsel, or in appellate counsel's letter to him. It does not appear in his first petition for a federal writ of habeas corpus, in his application to the court of

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[24] The New York State cases relied on by the court below do not hold that failure to call an alibi witness automatically deprives a defendant of effective assistance of counsel (Pet. App. 14a-15a). In each case cited by the court of appeals, the state court held that failure to call certain witnesses constituted ineffective assistance of counsel, but in each there was more. In *People v. Detling*, 73 A.D.2d 937, 423 N.Y.S.2d 509 (2d Dept. 1980), counsel had failed to call the defendant's father, although he knew that the father had corroborated the alibi under oath before a grand jury. In *People v. Zayas*, 61 A.D.2d 594, 403 N.Y.S.2d 519 (1st Dept. 1978), counsel failed to call three witnesses who could corroborate the alibi only because counsel did not know of the law by which he could compel their presence in court. Thus, in each of these cases, unlike this case, the defendant showed that his attorney failed to call a witness known to possess information favorable to the defendant.

appeals for reconsideration, or in his second petition for federal relief.

The claim appears for the first time in the brief to the Court of Appeals in the Second Circuit, prepared by counsel newly appointed for that appeal. The court of appeals found the claim nonfrivolous, and found that defendant had urged his state appellate counsel to raise it, but neither finding is supported by the record.

C. The Claim That Trial Counsel Was Ineffective In That He Failed To Make An Offer Of Proof Concerning The Complainant's Medical Or Psychiatric History.

The court of appeals further found that appellate counsel should have argued that trial counsel erred in not presenting an offer of proof of the relevance of evidence that the complainant had once fainted on the street (Pet. App. 15a; T. 58). That claim was frivolous because trial counsel did in fact make such an offer of proof. If the offer was deficient, it was not through any fault of counsel, but rather because the doctors could not determine the cause of the blackout. Moreover, appellate counsel raised the issue of the medical records in a much more effective fashion, by arguing that the trial court improperly excluded evidence of the victim's psychiatric history. Thus the court of appeals now faults appellate counsel for framing the issue as an error of the trial court, rather than an error of trial counsel. That decision is quintessentially a strategic decision for the professional judgment of counsel. To characterize that decision as constitutional error staggers the imagination.

Defendant at no time asked his counsel to raise the issue. He never even asked counsel to discuss the handling of the medical records at all, much less to discuss it as an error of trial counsel rather than as an error of the trial court. If defendant had sought to frame the

legal issue, it would have been appropriate for his counsel to overrule defendant's judgment on that purely legal matter. In fact, however, nothing of the sort happened. Defendant first claimed that trial counsel should have handled the records differently in his brief to the Second Circuit Court of Appeals. Thus, that court was simply mistaken in finding that this was a colorable appellate issue requested by defendant and omitted by his counsel.

D. The Claim That Trial Counsel Was Ineffective That He Failed to Object to the Prosecutor's Summation.

The court of appeals also held that appellate counsel should have argued that trial counsel was ineffective in that he failed to object to the prosecutor's summation. This claim, too, had slim chance of success on appeal. Because defendant chose to testify, against his counsel's advice, he exposed himself to cross-examination and impeachment on several grounds: his interest in the outcome of the case, his criminal record for theft, and his uncharged crime of fraudulently obtaining welfare payments. All those challenges to his credibility were perfectly proper, and the prosecutor was entitled to urge the jury, on the basis of that impeachment, to discredit the alibi. If trial counsel had objected to the summation, the objection would probably have been overruled, and the objection itself might have been counter-productive in the eyes of the jury. The failure to object was not error at all, nor did it amount to ineffective assistance of trial counsel.[25] It would have been futile to raise that point on appeal.

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[25] Trial counsel's failure to object did not, in any event, preclude appellate counsel from challenging the propriety of the summation on appeal because the Appellate Division has jurisdiction to review any claim in the interest of justice. N.Y. Crim. Proc. Law §§ 470.15(3)(c), (6)(a) (McKinney 1981). However, for the reasons stated above, a direct challenge to the summation would have been equally futile.

Moreover, defendant never urged appellate counsel to raise the point. This point too, appeared for the first time in defendant's brief in the court of appeals. The possibility of claiming summation error was first suggested by appellate counsel, in his letter to defendant. When counsel discarded the idea, defendant chose to rescue it by filing supplemental *pro se* briefs. But defendant never objected to counsel's decision. Nor did he, or counsel, ever suggest that the claim of summation error should be treated as an aspect of ineffective assistance of trial counsel. Once again, the court of appeals was mistaken both in finding the issue colorable and in finding that defendant asked appellate counsel to raise it.

E. The Claim That The Trial Court's Charge Was Deficient Regarding Accessorial Liability.

The court of appeals held finally that appellate counsel should have argued that the trial court improperly refused to instruct the jury on accessorial liability, and improperly refused to charge that defendant could be convicted only if he had the necessary intent. This claim is patently frivolous, because the trial court gave exactly those instructions.

The trial court instructed the jury that the defendant was charged with acting in concert, and that therefore they could only consider evidence of the actions of other people if they found that the defendant was in fact acting in concert with those other people, and aiding and abetting them (T. 174-76).

The court explained this instruction by giving the example of a baseball team, and telling the jury that if they found two or more persons committed a crime as a team, then each would be responsible for the acts of the others (T. 176). The court further charged that intent was an essential element of the crime, and that the jury

could not convict the defendant unless they found that he intended to commit the acts charged (T. 177).

Thus, every point identified by the court of appeals was included in the charge, and it would have been frivolous to claim on appeal that those points were omitted.

Moreover, defendant never urged his lawyer to make that claim on appeal. The claim was one of the seven mentioned by appellate counsel in his letter, and one of the four that counsel eventually decided not to raise. Defendant raised this claim in his second and third supplemental *pro se* briefs,[26] but he never complained about counsel's decision nor did he ever indicate that he wanted counsel to raise the point. He first renewed his complaint about the charge on accessorial liability in his first petition for federal habeas corpus relief. He first complained about appellate counsel's failure to raise the point in his application to the New York Court of Appeals for reconsideration, and his second petition for a federal writ of habeas corpus. Thus, the court of appeals is mistaken in finding that the issue was colorable, and that defendant asked his appellate counsel to raise it.

Summary

None of these five issues had any merit. Appellate counsel's decision to omit them, or to frame them differently from the way the court of appeals would have preferred, was a reasonable professional judgment, which probably improved defendant's chances for success on

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[26] The claim, as it appeared in the appellate counsel's letter and defendant's second and third *pro se* briefs, was actually that the trial judge erred in refusing to charge in the language requested by trial counsel (J.A. 28, 44, 52). The request of trial counsel (T. 188) included an incorrect statement of New York law. Thus, the trial judge properly refused to use this language.

appeal. Counsel clearly complied with the constitutional requirement to provide effective assistance of counsel on appeal. Moreover, none of these issues was the subject of dispute between defendant and his counsel. Defendant did not urge his counsel to raise any of them. Some issues were raised by defendant himself, in a supplemental *pro se* brief on which he identified himself as co-counsel. Other issues were suggested and then abandoned by appellate counsel, with no protest from defendant. Other issues were raised for the first time in the Court of Appeals for the Second Circuit. None of these actions constitutes a request by defendant to his state appellate counsel. Thus, even if there were any constitutional support for the rule announced by the court of appeals in this case, there would be no constitutional error here. Counsel simply did not fail to raise any colorable issue requested by defendant.

III. Defendant Has Not Shown Actual Prejudice And Therefore Is Not Entitled To Habeas Corpus Relief.

In reviewing challenges to criminal convictions, this Court has consistently refused to reach claims of constitutional error in the absence of a showing of actual prejudice to the defendant. A defendant is not "in custody in violation of the Constitution" for purposes of relief under 28 U.S.C. § 2254(a), if the defendant merely points to a violation of the Constitution that did not affect the conviction or the continuation of custody. That is the meaning of the "prejudice" requirement for habeas corpus relief, articulated in *Wainwright v. Sykes*, 433 U.S. 72, 91 (1977). In order to show actual prejudice, a criminal defendant seeking collateral relief "must shoulder the burden of showing, not merely that the errors [in the proceedings] created a *possibility* of prejudice, but that they worked to his *actual* and substantial disadvantage. . . ." *United States v. Frady*, 102 S. Ct. 1584, 1596 (1982).

The claim that a defendant was denied effective assistance of counsel is not exempt from this principle. There is no *per se* rule requiring reversal of a conviction any time a defendant shows some possible impairment of the right to counsel. Instead, a reviewing court must determine whether the claimed error resulted in any prejudice to the defendant. *United States v. Morrison*, 449 U.S. 361, 365 (1981); *Chambers v. Maroney*, 399 U.S. 42, 53-54 (1970).

If defendant were totally without counsel, a separate inquiry into prejudice would be unnecessary, because a total deprivation of counsel is presumptively prejudicial. *See, e.g., Anders v. California*, 386 U.S. 738 (1967) (appellate counsel); *Douglas v. California*, 372 U.S. 353 (1963) (appellate counsel); *Gideon v. Wainwright*, 372 U.S. 335 (1963) (trial counsel). The court of appeals mistakenly believed this case fell in that category.

The court below treated each issue as if it were a separate appeal, and concluded that defendant was totally deprived of appellate counsel on particular issues. Therefore the court followed *Douglas* and *Anders* in analyzing the claim as a total deprivation of counsel from which no prejudice need be shown (Pet. App. 13a). But as we have demonstrated in Point I of this Brief, defendant's claim is not that he was denied a lawyer. Instead he is challenging the effectiveness of his lawyer's performance. Therefore, his claim cannot provide a basis for relief unless he can show that his lawyer's omissions had some likely effect on the outcome of the case.[27]

---

[27] The requirement of prejudice is conceptually distinct from the inquiry into harmless error. *See United States v. Decoster*, 624 F.2d 196, 208 (D.C. Cir. 1979) (*en banc*). Defendant must establish prejudice in the sense of a *likely* effect on the outcome in order to make out the violation of his right to effective assistance of counsel. Even after defendant makes that showing, the state is entitled to show that the constitutional violation was harmless *in fact*. *Moore v. Illinois*, 434 U.S. 220, 232 (1977).

Here, no court has found that counsel's decision to omit certain issues on appeal had any effect on defendant's right to a fair review of his conviction, and there is no basis in the record for such a finding. As we have demonstrated in Point II of this Brief, each of the issues was frivolous or nearly so. The omission of these issues from a brief presenting other more substantial issues could not have impaired defendant's chances on appeal. Defendant has failed to demonstrate prejudice of any kind, and therefore there is no basis whatever for the relief ordered by the court of appeals.

CONCLUSION

The judgment of the court of appeals should be reversed.

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District Attorney

BARBARA D. UNDERWOOD
KAREN M. WIGLE
Assistant District Attorneys

August 1982.

APPENDIX I

The following is a list of all appellate issues which are either mentioned in the correspondence between Michael Melinger and defendant or contained in a document submitted to a state or federal court. The appearance of the same issue in more than one document is designated by the repetition of the assigned number.

Defendant's first *pro se* brief.

1. The hospital show-up was unduly suggestive. (Point I, J.A. 17-19).
2. Defendant's trial counsel was ineffective in that
   a. He failed to investigate an alibi defense. (Point II, J.A. 19-21).
   b. He failed to discover inaccuracies in the victim's testimony. (Statement of Facts and Point IV, J.A. 23).
3. The prosecutor should not have cross-examined defendant concerning prior crimes or misconduct. (Point III, J.A. 21-22).
4. The trial court should have explored inaccuracies in the victim's testimony. (Point IV, J.A. 22).
5. The arresting officer should not have testified that defendant's father called to defendant by his nickname, "Froggy". (Contained in Points I and IV, J.A. 18-19, 23).

Defendant's letters to Mr. Melinger, as reported in Mr. Melinger's response. (J.A. 27).

2. Defendant's trial counsel was ineffective. (The basis for this claim was not specified.) (Point h).

4a. The victim falsely testified as to numerous collateral facts. (Points a, b, c, d, e, g).

Appendix I

5a. The arresting officer falsely testified that defendant's father called him "Froggy." (Point f).

Mr. Melinger's letter to defendant, dated November 9, 1977. (J.A. 28).

1a. The trial court erred in finding that the victim's identification of defendant was based upon an independent source. (Point 1).

5. The arresting officer improperly bolstered the identification testimony. (Point 4).

6. Evidence of the victim's medical or psychiatric history was improperly excluded. (Point 2).

7. The trial judge improperly participated in the cross-examination of defendant. (Point 3).

8. The trial judge improperly expressed an opinion during the trial. (Point 5).

9. The prosecutor's summation was improper. (Point 6).

10. The trial court improperly denied trial counsel's request to charge on accessorial liability. (Point 7).

Mr. Melinger's brief in the Appellate Division.

1a. The trial court erred in finding that the identification of defendant was based upon an independent source. (Point III, J.A. 38-40).

6. The trial court improperly barred evidence of the victim's psychiatric history. (Points I and II, J.A. 35-37).

7. The trial judge improperly cross-examined defendant. (Point IV, J.A. 40-42).

Appendix I

Defendant's second *pro se* brief.

8. The trial judge improperly expressed an opinion during the trial. (Point II, J.A. 45).

9. The prosecutor's summation was improper. (Point III, J.A. 45).

10. The trial court improperly denied trial counsel's request to charge on accessorial liability. (Point I, J.A. 44).

Defendant's third *pro se* brief.

8. The trial judge improperly expressed an opinion. (Point II, J.A. 51-52).

9. The prosecutor's summation was improper. (Point I, J.A. 51).

10. The trial court improperly denied trial counsel's request to charge on accessorial liability. (Point II, J.A. 52).

The brief of Assistant District Attorney Sharen Litwin.

1a. The in-court identificaton of defendant was admissible because it was based upon an independent source. (Point II, J.A. 61-62).

2a, 2b. Defendant's trial counsel provided effective representation. (Point IV, J.A. 64-65).

3. The prosecutor's cross-examination of defendant was proper. (Point VI, J.A. 67-68).

5. The arresting officer did not improperly bolster the victim's identification of defendant. (Point VII, J.A. 68-69).

6. Evidence of the victim's alleged psychiatric history was properly excluded. (Point I, J.A. 60-61).

7. The court's questioning of defendant was proper. (Point III, J.A. 63-64).

9. The prosecutor's summation was proper. (Point V, J.A. 66-67).

Defendant's application for leave to appeal to the New York Court of Appeals presented all the issues raised in Mr. Melinger's brief and defendant's *pro se* briefs.

Defendant's application to the New York Court of Appeals for reconsideration of the denial of leave to appeal* claimed that defendant was denied effective assistance of appellate counsel on direct appeal, in that counsel failed to include in his brief or argument the following issues suggested by defendant:

2. Defendant's trial counsel was ineffective. (The basis for this claim was not specified.) (J.A. 81, 85).

9. The prosecutor's summation was improper. (J.A. 88).

10. The trial court improperly denied trial counsel's request to charge on accessorial liability. (J.A. 88).

11. Defendant's sentence was illegal or excessive. (J.A. 81, 84, 89).

In addition, defendant claimed his appellate counsel was ineffective in that he failed to provide defendant with a copy of the People's brief before the oral argument of the appeal. (J.A. 82, 86).

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* This application is substantially identical to the memorandum of law submitted in support of defendant's second petition for a writ of habeas corpus. The references to the Joint Appendix refer to that memorandum.

Appendix I

Defendant's first petition for a federal writ of habeas corpus.

1. The in-court identification of defendant was tainted by a suggestive show-up. (Appendix II, 9a-10a).

2b. Defendant was denied effective assistance of trial counsel in that his counsel failed to investigate adequately the victim's account of his actions the day of the robbery. (Appendix II, 13a-14a).

3. The prosecutor improperly cross-examined defendant. (Appendix II, 13a).

6. The trial court erred in excluding evidence of the victim's alleged psychiatric history. (Appendix II, 8a-9a).

7. The trial judge improperly cross-examined defendant. (Appendix II, 10a-12a).

10. The trial court improperly denied defense counsel's request to charge on accessorial liability. (Appendix II, 15a).

Defendant's second petition for a federal writ of habeas corpus raised all the same claims raised in his application to the New York Court of Appeals for reconsideration of the denial of leave to appeal.

Defendant's brief in the United States Court of Appeals for the Second Circuit argued that defendant was denied effective assistance of appellate counsel on direct appeal in that his counsel failed to raise the following claims requested by defendant:

2. Trial counsel's representation of defendant was ineffective in that:

[a, b] trial counsel failed to investigate and prepare the defense. (Defendant's brief in the court of appeals at 33).

[2c]* trial counsel did not call defendant's father as a witness. (Defendant's brief in the court of appeals at 33).

[6]** trial counsel failed to make an offer of proof as to the relevance of the alleged psychiatric history. (Defendant's brief in the court of appeals at 34).

[9]** trial counsel failed to object to the prosecutor's summation. (Defendant's brief in the court of appeals at 35).

10. The trial court failed to charge the jury on accessorial liability. (Defendant's brief in the court of appeals at 37).

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* This issue was never raised before in any forum, though it bears some resemblance to #2b, the failure to investigate the alibi defense.

** These issues were earlier raised as direct claims of trial error, and are now recast as aspects of ineffective assistance of trial counsel, and the omission of these issues on appeal is in turn cast as an aspect of ineffective assistance of appellate counsel.

APPENDIX II

UNITED STATES DISTRICT COURT

EASTERN DISTRICT OF NEW YORK

78 C 1717

UNITED STATES *ex rel.* DAVID BARNES,

Petitioner,

—against—

EVERETT W. JONES, Supt., Great Meadow Correctional Facility,

Respondent.

DAVID BARNES, *Pro Se*

LOUIS J. LEFKOWITZ, *Attorney General of the State of New York*
(Charlotte C. Lee, Esq., of counsel) for respondent

NICKERSON, *District Judge*

Memorandum and Order

Petitioner was convicted of robbery and assault following a jury trial in the Kings County Supreme Court and sentenced to seven and a half to fifteen years. The Appellate Division, Second Department, affirmed his conviction without opinion, and the New York Court of Appeals denied leave to appeal.

Petitioner filed this application for a writ of habeas corpus, setting forth four grounds for relief: that the trial court had prohibited defense counsel's cross-examina-

tion of the sole government witness as to his mental condition; that the court failed to rule on whether an in-court identification was tainted by a suggestive show-up identification; that the prosecutor's and trial judge's cross-examination of petitioner deprived him of a fair trial; and that defense counsel's failure to investigate factual and legal defenses deprived petitioner of adequate assistance of counsel. All four issues were raised by petitioner on appeal in the state courts, and therefore petitioner has exhausted his state remedies.

Cross-Examination As To Mental Condition

In the course of his cross-examination of the complainant, who was the sole government witness, petitioner's attorney asked if he had ever had any kind of psychiatric treatment. After objection by the prosecutor, petitioner's counsel explained at side-bar that the witness had once suffered an unexplained black-out on the street for which he was hospitalized. The trial judge ruled that counsel's question was improper.

Petitioner asserts that the trial court erred in barring evidence of psychiatric history, which is relevant to the credibility of the witness, and thereby removed the issue of credibility from the province of the jury.

Initially, it is subject to question whether the evidence which petitioner's counsel sought to present to the jury, the witness' hospitalization for fainting, is psychiatric history as that term is ordinarily understood. In any case, both federal and New York state courts broadly permit cross-examination as to the mental condition of the witness at the time he is testifying or at the time about which he is testifying, on the principle that the jury should be informed of all matters affecting credibility.

Appendix II

See United States v. *Hiss*, 88 F.Supp. 559 (S.D.N.Y. 1950); *Ellarson* v. *Ellarson*, 190 N.Y.S. 6 (3d Dept. 1921).

Hence evidence of mental incapacity in any form is treated like any credibility evidence and is admissible subject to relevance. Determination of relevance is for the trial judge based upon the offer of proof made by counsel. In the instant case, counsel did not demonstrate how the black-out suffered by the witness at some indeterminable time prior to the incident might have affected his perception at the time he was robbed or rendered his in-court testimony suspect. Therefore the trial judge did not abuse his discretion in ruling that counsel's question was not relevant. Moreover, the judge may have held that counsel's question, whether the witness had had psychiatric treatment, was too broad and not sufficiently related to the evidence counsel was attempting to elicit to satisfy the test of relevance. In any case, the value of evidence as to the witness' single black-out without more as a means of suggesting his incapacity to observe and testify appears so slight that petitioner was not prejudiced by its exclusion.

In-Court Identification of Petitioner

Petitioner argues that his identification at trial by the complaining witness was tainted by an impermissibly suggestive show-up in the witness' hospital room. Petitioner had been brought by the police to the witness' hospital room within twenty-four hours after the assault and robbery and was immediately identified by the witness as his assailant.

Although the trial judge noted that this was "the worst possible way of having a show-up", he did not rule on whether the out of court identification was unnecessarily

suggestive, since he found that the in-court identification was made independently on the basis of the witness' knowledge of petitioner for several years. Testimony at the *Wade* hearing, *United States* v. *Wade*, 338 U.S. 210 (1967), revealed that the witness had been acquainted with petitioner for five years, from junior high-school and the housing projects where they both lived.

Whether or not the hospital show-up was suggestive, the in-court identification was admissible since it stemmed from a source independent of the show-up. *United States* v. *Wade*, *supra*. There was convincing testimony that the witness was sufficiently acquainted with petitioner to be able to identify him by sight. Further the witness testified that he recognized petitioner at the time of the robbery, and he gave an accurate description of petitioner to the police. The lighting was dim, but there is no suggestion that the witness could not see his assailant. Although the witness' glasses were knocked off during the struggle, the witness testified that he recognized petitioner as he approached and that petitioner spoke to him. Moreover, the witness was able to see several feet without his glasses. Under the circumstances, the witness' prior acquaintance with petitioner and his recognition of him at the time of the incident are sufficient bases for his in-court identification.

Conduct of the Trial Judge

Petitioner contends that the trial judge's questioning of him during cross-examination denied him a fair and impartial trial. At one point during cross-examination of petitioner, petitioner stated that he had not gone to work because he had to pick up a welfare check. The following questioning ensued:

> "THE COURT: You mean you're collecting welfare?

THE WITNESS: Yes.

THE COURT: While you were working off the books?

THE WITNESS: Yes."

At another point, the prosecutor was questioning petitioner about prior robbery convictions. Petitioner stated he didn't have anything to do with a robbery for which he had been convicted.

"THE COURT: That's the second robbery you had nothing to do with, right?

THE WITNESS: That I had nothing to do with? What are you convicting me on, my record or this present crime that I'm here for?

THE COURT: That's a good question. And I'll instruct the jury about that."

Although a judge is not a passive spectator at trial, he must preserve an attitude of impartiality and guard against communicating to the jury any impression that the court is of the opinion that the defendant is guilty. *United States* v. *Natale*, 526 F.2d 1160, 1169 (2d Cir. 1975). A judge is permitted to question witnesses to clarify testimony and assist the jury in understanding evidence, *United States* v. *DeSisto*, 289 F.2d 833, 834 (2d Cir. 1961), but such intervention should not become the rule. *United States* v. *D'Anna*, 450 F.2d 1201 (2d Cir. 1971). The test is whether the judge's participation reaches the point at which it appears clear to the jury that the court believes that the accused is guilty.

A reviewing court must exercise great care in considering a claim of bias, since the record cannot reveal the intonations and facial expressions which may convey

an unmistakeable impression to the jury. On the other hand, the enormous pressure on trial judges to expedite the proceedings, which may lead to excessive intervention, must be kept in mind. The judge's participation has been found to have denied a defendant a fair trial where, for example, the judge rehabilitated a prosecution witness, *United States* v. *Nazzaro*, 472 F.2d 302 (2d Cir. 1973), or where the judge interrupted trial counsel with his own questions aimed at testing the plausibility of the defense witness' version of an incident while remaining passive as the government witness gave his version. In such cases, the judge's belief as to the facts and in particular the credibility of the witnesses was made clear to the jury.

In the instant case, the trial judge's brief questioning could well have been intended to clarify the testimony. In each case the judge reiterated what petitioner had already testified to. The colloquy was brief, and the judge did not comment on the testimony. Perhaps the judge's emphasis on the points was unnecessary and conveyed to the jury the judge's disapproval or disbelief of petitioner's testimony. But the questioning certainly was not so extensive as to amount to wholesale involvement in the government's case. *United States* v. *Cuevas*, 510 F.2d 848 (2d Cir. 1975). The record reveals no antagonism on the part of the judge toward petitioner or his counsel. There is no suggestion that the judge's treatment of prosecution and defense witnesses was imbalanced.

Finally, the judge specifically instructed the jury that any questions he may have asked the witnesses were intended not to impugn but to clarify their testimony. Such an instruction informed the jury that they should not speculate as to the judge's opinion of the witnesses and that the question of credibility was theirs to decide. *See United States* v. *Williams*, 575 F.2d 388 (2d Cir. 1978). The points which the judge's questions clarified were rele-

vant to the issue of credibility and could be properly considered by the jury.

Petitioner asserts that the trial judge did indicate his bias against petitioner during the trial, at one point calling petitioner a "masochist." The comment was made outside the presence of the jury and hence could not have influenced their deliberations. Hence the comment in no way affected petitioner's right to a fair trial by the finders of fact, the jury.

Prosecution's Questions

Petitioner also claims that the prosecutor's cross-examination of him concerning previous convictions deprived him of a fair trial. So long as such convictions stand as effective judgments, they may be raised on cross-examination to attack petitioner's credibility as a witness, and such questioning in no way deprived petitioner of a fair trial. The court's determination that the probative value of this evidence outweighed its possible prejudicial effect was not an abuse of discretion.

Petitioner alleges that the prosecutor improperly questioned him about a burglary in 1970 for which he was never convicted. When the matter was raised, defense counsel requested and the court gave an instruction to the jury not to draw any inferences from the question asked. The prosecutor admitted he was mistaken and did not pursue the matter. Under the circumstances, petitioner was not prejudiced.

Inadequate Assistance of Counsel

Petitioner finally argues that he was denied adequate assistance of counsel by reason of his trial counsel's fail-

ure to investigate the complaining witness' account of his actions the day of the robbery, which petitioner alleges would have revealed certain inconsistencies in the witness' testimony. In his state appeal petitioner further claimed that his trial attorney had not interviewed him until the commencement of the trial and had failed to develop a possible alibi defense.

In order to prevail on his claim that he was denied adequate assistance of counsel, petitioner must show that counsel's representation was "so woefully inadequate as to shock the conscience of the court and make the proceedings a farce and mockery of justice." *United States* v. *Wight*, 176 F.2d 376, 379 (2d Cir. 1949). A reviewing court must ascertain whether counsel's alleged incompetence has "blotted out the essence of a substantial defense." *United States ex rel. Mitchell* v. *LaVallee*, 417 F.Supp. 154, 159 (S.D.N.Y. 1976), *quoting United States ex rel. Testamark* v. *Vincent*, 496 F.2d 641 (2d Cir. 1974).

In the instant case, petitioner's trial counsel appears to have been well prepared and a vigorous advocate on behalf of his client. There is no indication from the transcript that he was unfamiliar with the case. The cross-examination of the complaining witness was thorough. Counsel did obtain a stipulation from the prosecutor that the friend whom the complaining witness testified he had gone to visit at the apartment where he was robbed was at school on the day in question, and counsel made much of the witness' alleged false statement in his summation. Further, counsel had petitioner take the stand and present his alibi defenses, namely that his father and girlfriend were home with him on the day of the robbery. Hence petitioner's specific claims of omissions on the part of his counsel are without merit.

Appendix II

Failure to Instruct the Jury

Petitioner's papers raise a final claim for relief, that the judge arbitrarily refused to charge the jury as requested by counsel. Neither the papers nor the transcript indicate the substance of counsel's suggested charges. Petitioner points to the refusal to charge as another indication of the trial judge's bias against him. The issue was not raised in petitioner's appellate briefs.

This court lacks jurisdiction to consider the merits of the claim that the court erred in failing to give the charges requested by defense counsel, since petitioner has failed to exhaust state remedies with respect to that claim. *Pitchess* v. *Davis*, 421 U.S. 482 (1975); *Picard* v. *Connor*, 404 U.S. 270 (1971). Further, petitioner has not demonstrated that the judge showed such bias against petitioner in his rulings, questions, or otherwise as to deprive petitioner of a fair trial.

Petitioner has requested counsel to be appointed to assist him in pursuing his claims. Petitioner filed this application for a writ of habeas corpus and reply papers which clearly presented his claims. In view of the findings of this court on the merits, this court declines to appoint counsel as to the issues raised in the petition. The petition is dismissed. So ordered.

Dated: Brooklyn, New York
November 27, 1978

EUGENE H. NICKERSON

/s/ .....

EUGENE H. NICKERSON, U.S.D.J.

The Clerk shall make copies of this Memorandum and Order and serve them upon the parties.

APPENDIX III

Legal Defense Panel for Indigent Accused

Plan of the Association of the Bar of the City of New York, Bronx County Bar Association, New York County Lawyers' Association, Queens County Bar Association and Richmond County Bar Association

Adopted Pursuant to Article 18-B of the County Law

Approved by the Judicial Conference of the State of New York, April 28, 1966

* * *

IV. Appointment of Counsel

* * *

B. Duration and substitution of appointments.

* * *

2. The court may, in the interests of justice, substitute one appointed counsel from the panel for another, designated by the appropriate Administrator as herein provided, at any stage of the proceedings.

* * *

C. Appointments from appellate panels.

* * *

3. The appellate court may, at any point in the appellate proceedings, substitute one appointed counsel from the panel for another, designated by the appropriate Administrator as herein provided, in the same manner and under the same conditions as provided for in paragraph B of this Article IV.

Respondent's Brief

Office - Supreme Court, U.S.
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No. 81-1794

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,
Petitioners,

v.

DAVID BARNES,
Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Second Circuit

BRIEF FOR RESPONDENT

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STATEMENT

INTRODUCTION

In a federal habeas corpus proceeding the United States Court of Appeals for the Second Circuit held that David Barnes was denied his right to counsel on direct appeal of his New York State conviction. Specifically, the court below found that assigned appellate counsel's refusal to raise the colorable legal issues Barnes had urged him to present to the Appellate Division of the New York State Supreme Court deprived him of his right to counsel and his constitutional right to equal access to the appellate court.

STATE COURT PROCEEDINGS

1. The Trial

The prosecution charged that on March 15, 1976 at 1:00 p.m. Barnes and three others[1] robbed and assaulted Richard Butts in the hallway of an apartment building in Brooklyn, New York. T. 10-14.[2] The State presented essentially a "one witness case,"[3] relying on the testimony of the complainant. Butts, who claimed to have known Barnes from the neighborhood and junior high school, was permitted to identify Barnes despite the trial court's finding at the Wade Hearing that a pre-trial identification was "the worst possible way of having a show-up

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[1] No other persons were charged with the crimes and Barnes was indicted and tried alone.

[2] Numerals preceded by the letters "T." or "W." refer to pages in the Trial Transcript or the Wade Haring, respectively. References to petitioners' appendix to their petition for certiorari will be abbreviated, "Pet. App."; references to the petitioners' brief will be abbreviated, "Pet. Br."; references to the amicus curiae brief submitted by the United States Solicitor General's Office will be abbreviated, "Sol. Gen. Br."; references to the joint appendix will be abbreviated, "J.A.".

[3] The only other prosecution witness was Detective Ahern who testified at trial as to the facts of Barnes' arrest. T. 70-80.

made." W. 64. Butts, who the record unequivocally establishes, lied on the stand concerning his activities just prior to the alleged robbery,[4] testified that on the afternoon of March 15th he visited his friend "Linda" in her sixth floor apartment.[5] T. 23-27. When, according to Butts, he was leaving the building, he was grabbed from behind and assaulted by four men. During the incident his watch and $60 were taken. However, Butts testified it was not Barnes who took his watch and he did not know who took his money. T. 30.

On cross-examination, defense counsel sought to impeach Butts' ability to identify Barnes by use of a medical report which indicated that Butts had a history of blacking out. T. 58-59. When the trial court, *sua sponte*, sought to preclude this line of questioning, defense counsel made no offer of proof to establish its probative value, and consequently, the evidence was kept from the jury. T. 59.

At the outset of the defense case, counsel sought an adjournment in order that he have sufficient time to make certain decisions:

> [Defense Counsel]: Your Honor, I am prepared to proceed with my defense on Monday morning. There are certain decisions that will have to be made. I will have to give it more thought.

T. 84. On the adjourned date, counsel's request for additional time in order to subpoena records was granted. Thereafter, when counsel indicated he needed still more time to confer with Barnes, the judge sharply rejected the application:

> [Defense Counsel]: . . . And at this point the defendant and I make one quick decision at this point. [sic.]

---

[4] At a bench conference after the close of the prosecution's case, the assistant district attorney revealed that Butts, when confronted with the conflicting evidence, conceded he had lied on the stand. T. 91.

[5] This testimony was false as Linda was in school at the time of the claimed visit. Concomitant with the assistant district attorney's concession that his sole witness had lied, was an offer by the State that Barnes accept a plea of a one and one half to three year sentence. T. 91.

> THE COURT: You have had all the time you will get. You have had a day and a half to make your decision. We've adjourned it so you can go to Pittsburgh Friday afternoon. We adjourned all day yesterday.

T. 93.

There followed a brief conference between counsel and Barnes and then Barnes testified on his own behalf that he did not know Butts, had not gone to school with him, and did not participate in the 1:00 p.m. assault and robbery of Butts. T. 97-101. Responding to questions by his lawyer, Barnes testified that on the day of the robbery he was home with his father until 2:30 p.m. Despite this evidence, Barnes' father was not called to testify, and defense counsel failed even to mention the alibi in his summation. T. 129-142. Counsel also failed to object to the hostile judicial inquiry of Barnes,[6] to the improper cross-

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[6] On cross-examination of Barnes, the judge, assuming the role of the prosecutor, inquired about prior robbery convictions. T. 106, 108. Thereafter, when Barnes asserted that a prior conviction had been ill-founded, the judge, sarcastically, asked:

> That's the second robbery you had nothing to do with, right?

T. 109. Because defense counsel failed to object, Barnes himself was forced to complain:

> . . . What are you convicting me on, my record or this present crime that I'm here for?

T. 109. Finally, the judge concluded the prosecution's cross-examination with the following inquiry.

> THE COURT: You mean you're collecting welfare?
>
> THE WITNESS: Yes.
>
> THE COURT: While you were working off the books?
>
> THE WITNESS: Yes.
>
> THE COURT: Go ahead.
>
> Do you have any more questions,
>
> Mr. Silverman?
>
> Mr. Silverman: I don't think so.

T. 122. Once again there was no objection lodged by defense counsel.

examination by the prosecutor,[7] or to his inflammatory summation,[8] allowing this improper testimony and prejudicial conduct to go to the jury without curative instruction.

In his charge to the jury, the judge declined to instruct on aiding and abetting liability. T. 188. While the judge did, by use of a baseball team analogy, T. 176, tell the jury that if a defendant is part of the team, he is responsible for the acts of the team, nowhere did the judge explain, as is required by New York law, what facts are necessary to establish that a defendant was on the team. Absent from the instruction in this case was any guidance to enable the jury to determine if Barnes had the requisite knowledge and intent to join the common plan or scheme to rob Butts.[9] As the only evidence against Barnes on the robbery charge was accessorial, this void necessarily had a critical impact on the jury's determination of guilt.

Barnes was convicted of second degree robbery and second degree assault and sentenced to concurrent terms of seven and

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[7] The entire focus of the prosecutor's examination of Barnes was directed improperly at the details of the crimes for which Barnes had previously been convicted. T. 103-113. Despite the clear impropriety of using the past convictions to show that Barnes was a "bad man," as opposed to impeaching his credibility, defense counsel objected only to the inquiry about third persons T. 103, 104, 106, 108, 109, but allowed the prosecutor to explore the lurid aspects of each conviction. T. 105, 106, 107, 110-111.

[8] The prosecutor argued in summation:

> But suddenly, today, Mr. Barnes gets up and tries to create some kind of lie . . . [Y]ou evaluate him. Does he have an interest in the outcome? Is he more apt to lie than Butts? You better believe it, you better believe it, you better believe it . . . [I]t's obvious to you, without raising my voice that on March 16th he [w]as a thief, he was a cheat, he was stealing. I think you all know that you can't work and collect welfare benefits. That's against the law. You think he was any less of a thief on March 15th than he was on March 16th? He made himself out to be what he is, a thief, liar and cheat.

T. 153, 159-60.

[9] What the judge did instruct on intent was that a person is presumed to intend the natural and probable consequences of his acts, T. 177, and, once again, there was no objection.

one half to fifteen years and three and one half to seven years, respectively. He is presently incarcerated.

2. The Appeal

Pursuant to N.Y. County Law § 722, counsel was assigned to represent Barnes on his direct appeal to the appellate division. In correspondence which included a *pro se* brief, J.A. 9-23, Barnes explicitly requested that his new lawyer raise certain issues on appeal, *inter alia*, the ineffectiveness of trial counsel.[10] With regard to this request, counsel responded that the issue was not available on appeal:

> New facts, or new factual arguments, that existed and were readily determinable at the time of trial, are not of assistance to us at this time. Among your suggestions and arguments that fall under this category are:
>
> * * *
>
> (h) that your trial attorney ineffectively represented you.

J.A. 27.

However, while counsel declined to raise this issue himself, nowhere did he suggest to Barnes that this argument, or the others that Barnes had urged upon him, would contradict or otherwise undermine the force of the issues counsel intended

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[10] While none of Barnes' letters is part of the record, counsel's response to Barnes reveals that there were, in fact, issues other than those presented in the *pro se* brief which Barnes had requested counsel to raise. J.A. 26-28. Moreover, in a sworn statement submitted to the district court in the instant habeas proceeding, Barnes asserted, J.A. 80, 86—and the State did not contest, J.A. 92-97—that he had urged his lawyer to raise each of the issues which are the subject of this proceeding. See *infra* at 31-43. Specifically, Barnes alleged:

> Assigned counsel and Petitioner [Barnes] communicated Via [sic.] correspondence. On or about November 7, 1977, the *Petitioner wrote counsel a letter specifying the points of law he wished raised on appeal.*

J.A. 80 (emphasis added).

to raise. Nowhere is there the dialogue between lawyer and client to persuade Barnes to forego presentation of the issues. On the contrary, counsel encouraged Barnes to present his requested issues to the appellate court in his own *pro se* briefs:

> I have read your supplementary brief. I do not necessarily agree with the points that you raised and that you addressed yourself to, since I do not think they are supportable by the record.[11] Your supplementary brief will, however, hopefully be submitted for the consideration by the Appellate Division.

J.A. 28 (footnote added).

Thereafter, counsel filed a brief arguing only three of the seven issues he had previously indicated to Barnes he would raise. J.A. 28. Barnes, dissatisfied with his lawyer's brief, filed additional *pro se* briefs so as to present the omitted issues he, quite properly, had assumed counsel would raise. In particular, Barnes noted the trial judge's error in refusing to instruct the jury correctly on the law of aiding and abetting. J.A. 44.

The prosecution's brief responded to the arguments raised by Barnes as well as by counsel. J.A. 53-69. However, as counsel did not send the State's brief to Barnes until after oral argument, J.A. 70, Barnes was precluded from replying.[12]

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[11] Comparison of the arguments urged by Barnes and the trial record reveals that appellate counsel was completely wrong in his assertions that the record would not support the requested legal arguments. For example, trial counsel's inadequate investigation and presentation of both factual and legal defenses are demonstrated throughout the record, including at T. 58-59, 84, 93, 109, 122, 153-54; the prosecutor's improper cross-examination of Barnes on the details of his prior conviction is clearly established at T. 102-113; and the judge's intrusion upon the jury's determination of Butts' credibility is established at T. 92.

[12] Petitioners miss the point when they contend, Pet. Br. at 7 n.10, that counsel cannot be faulted for this omission because he received the State's brief on the day of oral argument. The State's brief not only addressed the points raised in counsel's brief, but it also responded to Barnes' *pro se* arguments. Counsel did not seek a continuance to submit his own reply brief, and further, intruded upon Barnes' access to appellate review of the *pro se*

Moreover, counsel declined orally to argue any of the issues that Barnes had urged:

> I have just returned from the Appellate Division Second Department where I argued your appeal. I merely argued questions from my brief and did not argue the points raised by yourself in your first pro se brief and your supplementary pro se brief.

J.A. 70. By summary order, the appellate division affirmed the conviction. Leave to appeal to the New York Court of Appeals was denied.

OTHER RELEVANT FEDERAL AND STATE PROCEEDINGS

1. Earlier Habeas Corpus Proceeding

In a *pro se* petition for writ of habeas corpus filed in the federal district court, Barnes argued, as he had in his earlier *pro se* submissions to the appellate division, that his trial counsel was ineffective, and further, that the trial judge had improperly excluded, on the issue of credibility, evidence of Butts' black-outs.[13] The petition was denied in an opinion which held, in pertinent part, that the refusal to admit the evidence of Butts' prior black-outs was the result of trial counsel's error:

> Hence evidence of mental incapacity in any form is treated like any credibility evidence and is admissible subject to relevance. Determination of relevance is for the trial judge based upon the offer of proof made by counsel. In the

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issues by effectively preventing Barnes from filing a reply brief, to which an appellant is entitled. See *infra* at 31 n. 32. The gravamen of the error—that Barnes was unrepresented by counsel and denied access to the appellate court—flows from counsel's refusal to represent him on those requested colorable issues. That counsel did not have time to transmit the brief to Barnes is merely illustrative of the necessity of having counsel present the issues as Barnes had requested him to do.

[13] The other issues presented to the district court have no relevance to the instant proceeding.

> instant case, counsel did not demonstrate how the blackout suffered by the witness at some indeterminable time prior to the incident might have affected his perception at the time he was robbed or rendered his in-court testimony suspect. Therefore the trial judge did not abuse his discretion in ruling that counsel's question was not relevant. Moreover, the judge may have held that counsel's question, whether the witness had had psychiatric treatment, was too broad and not sufficiently related to the evidence counsel was attempting to elicit to satisfy the test of relevance.

Appendix II to Pet. Br. at 9a. The district court's rejection of the argument that trial counsel was incompetent was premised on the Second Circuit's "farce and mockery" standard. Appendix II to Pet. Br. at 13a-14a. Because the New York State courts apply a far less stringent test in measuring the ineffectiveness of counsel,[14] that determination does not control the instant proceeding.

2. New York State Court of Appeals Petition for Reconsideration

Barnes petitioned the New York State Court of Appeals for reconsideration of its denial of leave to appeal his conviction on the specific ground that appellate counsel's refusal, in the appellate division, to raise the issues Barnes requested amounted to a denial of counsel on direct appeal. The petition for reconsideration was denied on July 20, 1978.

THE INSTANT FEDERAL HABEAS CORPUS PROCEEDING

Barnes filed a petition for habeas corpus on the ground that refusal of his assigned appellate lawyer to raise requested colorable issues on direct appeal from his conviction denied him his right to counsel on appeal and access to the appellate court. In a sworn statement[15] submitted to the district court, Barnes

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[14] See *infra* at 33-34.

[15] Inexplicably, the notarization which appears after Barnes' signature at the end of this document was omitted from the Joint Appendix in the Court,

asserted that counsel assigned to represent him in the appellate division had refused to raise certain issues despite his indication to Barnes that those issues would be raised and despite Barnes' specific request that certain of the issues be presented to the court. J.A. 80-81, 86. Barnes explained that counsel's omissions compelled him to write to the appellate division complaining about the quality of counsel's brief and seeking leave to submit a *pro se* brief to raise the issues that counsel had refused to raise. J.A. 81. The State, in response, did not contest any of these factual assertions. J.A. 92-97.

On January 30, 1981, the United States District Court denied the petition. The United States Court of Appeals for the Second Circuit reversed, holding that assigned counsel's refusal to raise, on direct appeal, colorable issues requested by Barnes deprived him of his right to counsel and equal access to the appellate court:

> Thus, appointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial—the very right that an appointment of appellate counsel was designed to preserve. *See Douglas* v. *California*, 372 U.S. at 357-58, 83 S.Ct. at 816-17. *See also Ross* v. *Moffitt*, 417 U.S. 600, 606-07, 94 S.Ct. 2437, 2441-42, 41 L.Ed.2d 341 (1974); *Griffin* v. *Illinois*, 351 U.S. 12, 19, 76 S.Ct. 585, 590, 100 L.Ed. 891 (1956).

Pet. App. at 12a. Cognizant of the value of a lawyer's professional training and experience, the Second Circuit was careful to emphasize that it is important for counsel to exercise his judgment; however, in determining to forego a potentially meritorious claim, counsel's view cannot override that of his client. Pet. App. at 16a.

J.A. 91, as was the notarization at the end of the State's responding affidavit. J.A. 97. The notarization of Barnes' signature is included in a separate appendix to this brief at 1A.

The majority opinion reasoned that the right to be heard by counsel comprehends the right to have counsel present those colorable issues urged by the client and that the right cannot be infringed by counsel's lone determination that the issues will not succeed:

> Appointed counsel's judgment that appellant is unlikely to prevail on the merits of his nonfrivolous arguments is no substitute for an active advocate's presentation of those arguments to the appellate court, which is the appropriate forum for making a decision on the merits.

Pet. App. at 12a.

SUMMARY OF ARGUMENT

The court of appeals was correct in holding that the constitutional right to counsel and equal access to the courts requires assigned counsel to advocate, on direct appeal of a criminal conviction, those issues urged on him by his indigent client. The opinion below confirms the traditional role of counsel to evaluate the case, and consult with his client in the determination of the issues to be raised on appeal. That role assumes—and applicable canons of professional responsibility so require—that counsel will attempt to dissuade his client from making any decision which may not be in his best interest. However, in the few instances in which a client desires to participate in the appellate process and insists, despite his lawyer's advice to the contrary, that particular colorable issues be presented, the client's decision must control.

It is settled that the client, and not his attorney, maintains the absolute right to determine whether he will appeal from his judgment of conviction. The choice of issues to be included in such an appeal is fundamental both to the client's decision and to the appellate process. The only way to assure judicial consideration of a particular claim of error is to address the issue in the brief; indeed, in light of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977) and its progeny, issues not raised may well be foreclosed forever from review. The Second Circuit's holding that the client has the right to make this fundamental decision is sup-

ported by case law and basic principles of legal ethics. *Anders* v. *California*, 386 U.S. 738 (1967), upon which the court of appeals relied, sought to insure the indigent's right to direct access to the courts.

The indigent's right to access would be eviscerated by the petitioners' contention that the assignment of counsel should function to censor the client's choice of legitimate claims for relief. In contrast, the client with funds to retain a lawyer has the ability to assure that the colorable issues he requested will be professionally advocated. Nothing in the law or inherent to the nature of the appellate system would justify this distinction or the issue-blockade propounded by petitioners.

To give assigned counsel a stranglehold over the potentially meritorious issues which will be presented to the appellate court is particularly perilous in light of the acknowledged fallibility of counsel and the widely held perception by experts in the field that a large percentage of the defense bar is poorly trained and unqualified for the task. But whether the client's instructions to his lawyer would improve the quality of his representation is beside the point. Where counsel disagrees with the client's judgment to raise an issue, it is the client, informed by his lawyer of the alternatives, who must make the crucial decision because it is he, and not counsel, who will suffer the consequences of an affirmance.

The Second Circuit unanimously found that the issues counsel, in this case, refused to raise were colorable. Indeed, in light of the weakness of the prosecution's case, it appears that the issues Barnes wanted counsel to raise in the appellate division would have substantially improved his chances for reversal. In any event, counsel's abandonment of Barnes on those issues, thereby denying him access to the court, requires that the writ be granted without any additional showing of prejudice.

ARGUMENT

IN THE LIMITED CIRCUMSTANCES IN WHICH AN INDIGENT INSISTS THAT CERTAIN COLORABLE ISSUES BE RAISED ON DIRECT APPEAL, THE REFUSAL OF ASSIGNED COUNSEL TO DO SO VIOLATES THE INDIGENT'S RIGHT TO COUNSEL AND EQUAL ACCESS TO THE APPELLATE COURTS.

The Court of Appeals for the Second Circuit (Oakes, J.) held that appointed counsel must raise specific colorable issues on appeal if he is directed to do so by his client. Pet. App. at 12a. In reversing the district court's denial of an application for a writ of habeas corpus, the Second Circuit observed:

> [A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial—the very right that an appointed appellate counsel was designed to preserve.

Id. (citations omitted). Significantly, the court of appeals recognized that professional skill and experience uniquely qualify counsel to make decisions regarding the strategy and tactics attendant to his representation. Pet. App. at 16a. Moreover, nothing in the opinion of the court below detracts from counsel's obligations to evaluate the issues presented by the case, consult with his client, and jointly decide which legal arguments to pursue. However, in the limited circumstances in which the convicted indigent—not persuaded by his appointed counsel's advice to the contrary—urges that specific colorable issues be raised on appeal, counsel has the constitutional responsibility to do so.

Counsel's duty is not measured against a standard of lawyer competence, but rather is founded on his client's fundamental right to access to the courts. That right is impermissibly violated where, as here, assigned counsel abandoned the colorable issues which Barnes wanted him to raise on direct appeal,

thus leaving Barnes to fend for himself in articulating and presenting those claims to the appellate court.

A. Barnes Is Constitutionally Entitled To Have The Assistance Of Counsel To Raise, On Direct Appeal, The Colorable Claims Requested By Him.

The due process and equal protection clauses of the fourteenth amendment have long assured a person convicted of a crime the right to reasonable access to both the federal and state courts. *Bounds* v. *Smith*, 430 U.S. 817 (1977); *Procunier* v. *Martinez*, 416 U.S. 396, 419-22 (1974); *Douglas* v. *California*, 372 U.S. 353 (1963); *Griffin* v. *Illinois*, 351 U.S. 12 (1956); *White* v. *Ragen*, 324 U.S. 760, 763-64 (1945); *Ex Parte Hull*, 312 U.S. 546, 549 (1941). On direct appeal of a criminal conviction, that right was first guaranteed in *Griffin* v. *Illinois*, 351 U.S. 12, which provided the indigent defendant with a free transcript of the trial proceedings. Thereafter, the Court has assiduously protected ingress to the courts on a defendant's first appellate challenge to his conviction. *See, e.g.*, *Rodriquez* v. *United States*, 395 U.S. 327 (1969) (right to file of notice of appeal); *Entsminger* v. *Iowa*, 386 U.S. 748 (1967) (right to entire record on appeal); *Draper* v. *Washington*, 372 U.S. 487 (1963) (right to a transcript in order to challenge trial court's finding of frivolity); *cf. Lane* v. *Brown*, 372 U.S. 477 (1963) (invalidating a state statute which provided a transcript to an indigent only upon the application of the public defender); *Burns* v. *Ohio*, 360 U.S. 252 (1959) (right to filing fees). More recently, in *Ross* v. *Moffit*, 417 U.S. 600, 616 (1974), the Court confirmed the constitutional right to "an adequate opportunity to present . . . claims fairly."

Fundamental to this right of access, and protected by the equal protection clause as well, is the right to counsel on direct appeal. *See, e.g.*, *Bounds* v. *Smith*, 430 U.S. at 834 (Burger, C.J., dissenting); *Anders* v. *California*, 386 U.S. 738 (1967); *Swenson* v. *Bosler*, 386 U.S. 258 (1967) (per curiam); *Douglas* v. *California*, 372 U.S. 353. The theoretical underpinning of the right to counsel is readily apparent. Absent the "guiding

hand of counsel," *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932), the appellate process would be rendered meaningless. *See Douglas* v. *California*, 372 U.S. 353; *Cleaver* v. *Bordenkircher* 634 F.2d 1010, 1011 (6th Cir. 1980), *cert. denied, sub nom.*, *Sowders* v. *Cleaver*, 451 U.S. 1008 (1981) ("[u]nder our adversary system, it has become a well established principle that there is no substitute for counsel who acts as an advocate and who makes the best arguments he can on the facts and the law.") Thus, as explained by Justice Schaefer of the Illinois Supreme Court:

> Of all the rights that an accused person has, the right to be represented by counsel is by far the most pervasive, for it affects his ability to assert any other rights he may have.

Schaefer, *Federalism and State Criminal Procedure*, 70 Harv. L. Rev. 1, 8 (1956).

Of course, an indigent is entitled to an appointed counsel who will fulfill the same function and have the same responsibilities as lawyers available to defendants who can afford to retain them.[16] *See, e.g., Polk County* v. *Dodson*, 102 S.Ct. 445 (1981); *Douglas* v. *California*, 372 U.S. at 357-58; *Griffin* v. *Illinois*, 351 U.S. at 19. *See also* ABA, Standards For Criminal Justice, *The Defense Function* § 1.1(e)(1971) ("The functions and duties of defense counsel are governed by such [code and canon of the legal profession] standards whether he is assigned or privately retained.").

In *Anders* v. *California*, 386 U.S. 738, the Court established for assigned counsel a broad standard of responsibility essen-

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[16] The same principle has been recognized as an obligation of professional responsibility. The *ABA, Project On Standards For Criminal Justice, Criminal Appeals*, Introduction (1970) observed that:

> Quite commonly, appointed counsel lapse into the role of amicus curiae rather than advocate. Unwilling or unable to influence their clients through effective counselling, they take actions which adversely affect their clients or seek to withdraw from the cases. Great improvement is possible if appointed counsel would undertake to serve their clients as attorney in the fullest sense, as if retained for a substantial fee.

tial to assure the indigent the right to a meaningful appellate review of his conviction. Justice Clark explained:

> The constitutional requirement of substantial equality and fair process can only be attained where counsel acts in the role of an active advocate in behalf of his client, as opposed to that of amicus curiae. . . . His role as advocate requires that he support his client's appeal to the best of his ability.[17]

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[17] Notwithstanding the Solicitor General's arguments, Sol. Gen. Br. at 5-6, there can be no serious challenge to the constitutional right to assigned counsel on appeal who fulfills his mandated role. *Anders* v. *California*, 386 U.S. 738; *Douglas* v. *California*, 372 U.S. 353. Nonperformance by counsel is the functional equivalent of no counsel. *Rodriquez* v. *United States*, 395 U.S. 327. Traditional concepts of due process and equal protection necessarily attach to the *performance* of defense counsel. *See High* v. *Rhay*, 519 F.2d 109 (9th Cir. 1975). Moreover, concepts traditionally associated with the sixth amendment right to counsel may also provide guidance for formulating the due process and equal protection standards necessary to defining the duties of appellate counsel. Thus, in *Wood* v. *Georgia*, 450 U.S. 261 (1981), the Court recognized that defense counsel's divided loyalties may well have resulted in constitutionally infirm representation. Similarly, in *Cuyler* v. *Sullivan*, 446 U.S. 335, 348 (1980), the Court recognized that actual conflict of interests of counsel would give rise to a sixth amendment violation. *See also Glasser* v. *United States*, 315 U.S. 60 (1942). Surely, were an appellate lawyer to represent convicted co-defendants, the opportunity for conflict of interests could be present. One co-defendant's best legal argument may, for example, rest upon the marshalling of facts which would be contrary to the best legal arguments which should be argued on behalf of his co-defendant. To hold that the principles underlying *Wood* and *Cuyler* do not pertain in the appellate context would eviscerate the teachings of *Douglas* v. *California* and its progeny. The Solicitor's additional argument that, under *Polk County* v. *Dodson*, the nonfeasance or malfeasance of defense counsel may not constitute state action is incorrect. The petitioners concede that state action is present. Both *Wood* and *Cuyler* support the proposition that counsel's conduct is state action. Moreover, the *Polk County* Court decided the case in the context of 42 U.S.C. § 1983. The Court specifically noted, however, that:

> In addition to possible relief under state tort law, an indigent prisoner retains the right to initiate state and federal habeas corpus proceedings. For an innocent prisoner wrongly incarcerated as the result of ineffective or malicious counsel, this normally is the most important form of judicial relief.

386 U.S. at 744 (footnote omitted). The *Anders* Court explicitly rejected assigned counsel's refusal to prosecute his client's appeal on the basis of his own view that the record was without merit. The Court concluded that if upon initial review of "anything in the record that might arguably support the appeal" the appellate tribunal "finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal." *Id.* It is only with the zealous assistance of counsel that the indigent gains constitutionally required equality with the "rich man, who appeals as of right [and] enjoys the benefit of counsel's examination into the record, research of the law and marshalling of arguments on his behalf." *Douglas* v. *California*, 372 U.S. at 358.

The State, of course, does not challenge Barnes' constitutional right to the assistance of counsel. Pet. Br. at 13. Rather, it urges that the Court define the constitutional relationship between an assigned attorney and his indigent client in a manner that stands the principle of *assistance* of counsel on its head. Petitioners' theory would convert the role of counsel from one of effectuating access to the court to one of barricading the presentation of viable claims. Moreover, whereas the allocation of fundamental decision-making is reposed in the defendant who can afford to hire his own counsel, the State contends that the indigent's acceptance of appointed counsel eliminates the client's right to make any decision about the

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102 S.Ct. at 453 n.18. It is of significance that the United States Attorney General's Office, notwithstanding the amicus brief at bar, has elsewhere stated on public record that ineffective assistance of counsel may constitute state action. *The Habeas Corpus Reform Act of 1982: Hearings on S.2216 Before the Comm. on the Judiciary*, 97th Cong., 2d Sess. (1982) (submission of Ass't Attorney General Jonathan C. Rose). Finally, the Solicitor concludes his analysis of the issue with a recognition that it need not be resolved by the Court. Barnes agrees, especially in light of the fact that the issue was neither raised nor considered below.

appeal. As demonstrated below, basic constitutional principles do not tolerate such a result.[18]

Anders itself protects against the usurpation by counsel of the client's role in the appellate process as it confirms the indigent's right to have any nonfrivolous appellate issue advocated on his behalf.[19] An indigent who has elected to pursue an appeal will not suffer the drastic consequence of his assigned counsel's withdrawal—at least without the final determination by an impartial court that all conceivable issues presented by the case are frivolous.

Anders requires that if counsel, believing the record to contain only frivolous issues, files a brief in support of a withdrawal motion, he must furnish his indigent client with a copy of the brief to allow him "to raise any points that he chooses." 386 U.S. at 744. If, as the petitioners suggest, the indigent's access to the court was limited to those issues which counsel has chosen to raise, there would be no reason for the *Anders* requirement that the client be given the opportunity to raise the points "he chooses." Thus, the client need not submit his issues to his assigned counsel nor rely on counsel's decision to include the issues in the *Anders* brief. *Anders* requires that the client's issues be reviewed directly by the appellate court and that an attorney's conduct cannot bar that access. It follows

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[18] As Justice Stewart stated in *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966): "This Court has never held that the States are required to establish avenues of appellate review, but it is now fundamental that, once established, these avenues must be kept free of unreasoned distinctions that can only impede open and equal access to the courts."

[19] Disingenuous, at best, is the Solicitor's reliance on *Nickols* v. *Gagnon*, 454 F.2d 467 (7th Cir. 1971), *cert. denied*, 408 U.S. 925 (1972), for the proposition, Sol. Gen. Br. at 15-16, that counsel cannot and should not be required to argue every colorable claim. *Nickols* is inapposite on this point as the question in that case was whether counsel had the obligation to argue *frivolous* issues. The Solicitor's out-of-context quotation from the Seventh Circuit opinion pertains to the danger inherent in the affirmative presentation of meritless claims and has no application to a lawyer's duty to raise colorable issues.

inexorably that were the reviewing court to find the client's arguments colorable, some counsel would be constitutionally obligated to advocate them in the substantive appeal.[20]

The presentation of individual legal issues[21] is surely the essence of appellate representation.[22] State and federal appellate courts consistently refrain from considering legal arguments unless they are properly raised in the principal briefs. *See, e.g., Adickes* v. *Kress & Co.*, 398 U.S. 144, 147 n.2 (1970); *California* v. *Taylor*, 353 U.S. 553, 556 n.2 (1957); *Lee* v. *Corn Exchange Bank Trust Co.*, 270 A.D. 2, 58 N.Y.S.2d 290 (2d Dep't 1945), *aff'd*, 295 N.Y. 945, 68 N.E.2d 43 (1946) ("Upon this appeal, the defendant has not urged its defense of the three-year statute of limitations. The defense may, therefore,

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[20] Appellate courts would have two alternatives: counsel's application to withdraw can be denied, *see, e.g., Suggs* v. *United States*, 391 F.2d 971 (1968), *aff'd on merits*, 407 F.2d, 1272 (D.C. Cir. 1969) or new counsel can be appointed, *see, e.g., Louie* v. *United States*, 426 F.2d 1398, 1402 (9th Cir.) (per curiam), *cert. denied*, 400 U.S. 918 (1970).

[21] Petitioners' effort to limit the underlying principles of *Anders* to circumstances in which the lawyer finds no colorable issues is untenable. Pet. Br. at 15. Surely, were a lawyer to have identified one of several colorable issues in a trial record, and therefore, have no need to submit an *Anders* brief, his client's instruction that he advocate two others should not fall on deaf ears. Such an anomalous conclusion would mean that for an indigent to have access to the appellate courts with regard to those specific colorable errors, it would be more advantageous for him were his lawyer to have identified *no* arguable points than one or more additional points. This would be because in the former instance, *Anders* would allow for appellate review of the indigent's own points, whereas in the latter instance, petitioners contend, there is no way for the indigent to gain judicial review of his colorable points — save dismissing counsel altogether and proceeding *pro se*.

[22] As recognized in ABA, Standards For Criminal Justice, *Criminal Appeals*, 21-1.2, Commentary at 21-9: "The legal issues tend to come into focus in a trial setting as evidence unfolds. An appeal begins with a shaped set of legal questions. From these varying patterns, the function of review for error is primarily served at the first level of appellate consideration." (footnote omitted).

be deemed abandoned."); *Re Pessano's Estate*, 269 A.D. 337, 341, 55 N.Y.S.2d 786 (1st Dep't 1945), *aff'd*, 296 N.Y. 564, 68 N.E.2d 866 (1946). "To expect appellate courts routinely to search out new issues is simply unrealistic." *People ex rel. Douglas* v. *Vincent*, 50 N.Y.2d 901, 910 n.2, 409 N.E.2d 990, 431 N.Y.S.2d 518 (1980) (Meyer, J. dissenting). The preclusive effect can be devastating: a meritorious challenge which may have resulted in relief is waived.

The Court has recognized that state courts are not expected or assumed to deal with issues not raised by counsel. *Engel* v. *Isaac*, 102 S.Ct. 1558 (1982); *Wainwright* v. *Sykes*, 433 U.S. 72. Indeed, the entire concept of appellate review is the consideration of an issue which has been properly raised in the brief.

Given the critical importance of raising specific appellate issues, appellate courts have recognized that a convicted client's resolution to have particular arguments advocated on his behalf must be honored. This is so

> because counsel has a duty to press arguments indicated by his client which may arguably be supported, even though counsel does not personally espouse them.

Smith v. *Cox*, 435 F.2d 453, 458-59 (4th Cir. 1970) (per curiam), *vacated on other grounds sub nom.*, *Slayton* v. *Smith*, 404 U.S. 53 (1971). The decision to forego potentially meritorious issues on appeal should as much require input from the interested client as would the decision of whether to appeal in the first instance. As the late Judge Gurfein of the Second Circuit explained:

> The identification issue, if a serious issue, may perhaps not be left entirely to the lawyer's decision not to press it as an issue on appeal any more than the critical decision whether to take an appeal from a criminal conviction can be taken away from a defendant by his lawyer. . . . Nor would I agree to a general statement that once a defendant has a lawyer, *everything* and *anything* he asserts must fall on deaf ears.

Ennis v. *LeFevre*, 560 F.2d 1072, 1077 (2d Cir. 1977), *cert. denied*, 435 U.S. 976 (1978) (concurring opinion) (citation omitted). *See also Sincox* v. *United States*, 571 F.2d 876, 879 (5th Cir. 1978) ("Sincox had a fundamental right guaranteed by the Sixth Amendment that if convicted at all it would be a valid, unanimous jury verdict of guilt. He was adjudged guilty on the strength of an invalid, eleven out of twelve verdict. He had an absolute right to present that error on appeal and persistently asserted his desire to appeal, yet no appeal was taken. The 'prejudice' hurdle is quickly overcome."); Note, *Client-Counsel Between an Indigent Defendant and The Court-Appointed Attorney: A Procedural Analysis*, 13 U.S.F. L. Rev. 177, 196 (1978) ("The client and the counsel acting jointly should make decisions involving substantial rights; if a conflict arises, the defendant should control the final decision under well-defined procedures.")

This principle is equally well established as a tenet of legal ethics. The ABA, Code Of Professional Responsibility (1980 ed.) specifically provides:

> In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own. But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer.

EC 7-7. *See also* ABA, Code Of Professional Responsibility, EC 7-8 ("In the final analysis, however, the lawyer should always remember that the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client and not for himself."); ABA, Commission On Evaluation Of Professional Standards, *Model Rules of Professional Conduct* (Final Draft, June 30, 1982), Rule 1.14, Comment ("The normal client-lawyer relationship is based on the assumption that the client, when properly advised and assisted, is capable of making decisions about important matters."); ABA, Standard For Criminal Justice, Criminal

Appeals, 21-3.2, Commentary ("Another dimension to this question arises when, in the estimate of counsel, the decision of the client to take an appeal, or the client's decision to press a particular contention on appeal, is incorrect. Counsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome. Counsel's role, however, is to advise. The decision is made by the client.").

The ABA, Project On Standards For Criminal Justice, *Criminal Appeals*, Introduction (1970) has condemned the appellate counsel's refusal to advocate issues urged by his client. Thus, even where a client insists on raising frivolous issues, his counsel should "skillfully" accede to the instruction:

> Where a client insists upon adding frivolous contentions in a case containing other arguable points, counsel can present the case orally and in writing in a way that communicates the whole case without emphasis upon the weaker issues.

Id.

Petitioners do not contest, Pet. Br. at 16 n.14, that certain fundamental decision making in the criminal process has uniformly been held to be in the province of the client. In the trial context, decisions to plead, waive a jury, or testify are to be made by the defendant, not his counsel. *See, e.g., Wainwright* v. *Sykes*, 433 U.S. at 93 n.1 (Burger, C.J., concurring), *citing*, ABA, Project On Standards For Criminal Justice, *The Prosecution Function and Defense Function* § 5.2 (App. Draft 1971); *Brookhart* v. *Janis*, 384 U.S. 1, 7-8(1966) (establishing client's personal right to waive confrontation and cross-examination); ABA, Commission On Evaluation Of Professional Standards, *Model Rules of Professional Conduct* 1.2(a) (Final Draft, June 30, 1982). In this context it appears that decisions involving constitutional rights that do not require instantaneous determination will be allocated to the client.

While Barnes does not challenge counsel's right to make certain decisions regarding "strategy" and "tactic," these terms should not control when constitutional or fundamental rights are involved. Overbroad construction will eradicate the recognized distinction between fundamental, as opposed to strategic, decisions. For example, while the decision to testify or to waive a jury can be viewed as trial strategy—indeed, the decision by a defendant to testify might well dictate the tenor of the entire defense—nevertheless, as has been demonstrated, the courts and the accepted standards of professional responsibility uniformly recognize the right of the client to make these critical decisions. This is so even where counsel firmly believes that his client's insistence upon testifying would be severely detrimental to the case. Moreover, it is beyond dispute that once a client elects to take the stand, his counsel, although in disagreement with the decision, would nevertheless be obliged to conduct the direct examination and defend against any objections. If in these circumstances the client's right to override his attorney prevails, it would be wholly illogical to deprive him of the right to participate on appeal in determining the very basis of the challenge to his conviction.

In addition, considerations which compel allocating strategic decisions to counsel at trial, *Faretta* v. *California*, 422 U.S. 806, 820 (1975), do not pertain to the appellate process. The realities of the trial necessarily thrust upon the attorney certain responsibilities which cannot practicably be shouldered by the client. Thus, decisions regarding whether to object to testimony or cross-examine a witness are properly within trial counsel's province. As Chief Justice Burger observed:

> The trial process simply does not permit the type of frequent and protracted interruptions which would be necessary if it were required that clients give knowing and intelligent approval to each of the myriad tactical decisions as a trial proceeds.

Wainwright v. *Sykes*, 433 U.S. at 93 (concurring opinion) (footnote omitted). The appellate proceeding is markedly dif-

ferent from a trial. Accordingly, none of the unmanageable factors involving split-second decision making is present: fair judicial administration allows for a far more active role for the indigent who elects to participate in his representation on appeal.

The identification and development of appellate issues is a well-considered and thorough exercise in which a client's input and direction can easily be incorporated. Were a client to recommend an issue, his assigned counsel would be able to evaluate it in light of the record and applicable research. If, for strategic purposes, the attorney believed the issue would weaken the appellate presentation, there is time for counsel to so advise his client. *See generally* Marer, *Effective Criminal Appellate Advocacy: Seeking Reversal by Concurrent Collateral and Direct Attacks in the Appellate Court*, 27 Hastings L.J. 333 (1975) (hereinafter "Marer"). But having done so, it is the client, not counsel, who must ultimately decide.

The role of counsel in history confirms that it was his function to consult with and advise the defendant, not supplant him:

> The first lawyers were personal friends of the litigant, brought into court by him so that he might "take 'counsel' with them" before pleading. 1 F. Pollock & F. Maitland, The History of English Law 211 (2d ed. 1909).

Faretta v. *California*, 422 U.S. at 821 n.16. The Court, in considering the text of the sixth amendment, observed:

> The counsel provision supplements this design. It speaks of the "assistance" of counsel, and an assistant, however expert, is still an assistant. The language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to a willing defendant—not an organ of the State interposed between an unwilling defendant and his right to defend himself personally.

Id. at 820.

While *Faretta* addressed the issue of a defendant's right to represent himself, the basis of that right—that he "suffers the

consequences if the defense fails" *id.*—will not support the view that by choosing to be assisted by counsel, the defendant can be stripped of his right to participate in the fundamental process of deciding which issues will be presented on his appeal. An indigent who acknowledges his need for a lawyer's professional help on appeal from a conviction cannot, thereby, be deemed to have abdicated control over his destiny. To be sure, his lawyer will come to the case with more training and experience, but the client's own input into the issue selection process can be meaningful. *See Bounds* v. *Smith*, 430 U.S. at 826-27 ("More importantly, this Court's experience indicates that *pro se* petitioners are capable of using law books to file cases raising claims that are serious and legitimate. . . .").[23]

Nor does the client's choice of issues render counsel a mere "translator" or scribe. Pet. Br. at 17. Professional skill and judgment are essential to the effective presentation of legal issues. *Swenson* v. *Bosler*, 386 U.S. 258 (An indigent has the right to counsel on appeal for the purpose of marshalling the facts and articulating the legal theories pertaining to issues which were predetermined.).

The prejudice attendant to counsel's willful refusal to accede to his cleint's instruction to raise a colorable claim is readily apparent from cases such as *Cerbo* v. *Fauver*, 616 F.2d 714 (3d Cir.), *cert. denied*, 449 U.S. 858 (1980), relied on by petitioners, Pet. Br. at 19, to establish that courts of appeals other than the Second Circuit have found no error in counsel's obduracy.[24]

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[23] The client's judgment to raise a specific issue may be particularly significant in the situation where the lawyer, appearing both at trial and on appeal, might be inclined to bury his mistakes. *See, e.g.*, *Wood* v. *Georgia*, 450 U.S. 261. Alternatively, when a new lawyer is assigned on appeal, the client's perceptions are highly relevant as he is the one with first-hand knowledge of the events at trial.

[24] Petitioners' claim that three other circuits have rejected the Second Circuit's rule below is simply wrong. Pet. Br. at 19. Each of the cases relied on by petitioners is readily distinguishable. In *Gillihan* v. *Rodriguez*, 551

In *Cerbo*, the lawyer's refusal of his client's request that he raise an issue—subsequently held in another case to require relief—created a procedural bar to consideration of the issue in Cerbo's habeas corpus challenge.

Of course, under the doctrine of *Wainwright* v. *Sykes* and its progeny, assigned appellate counsel's refusal to accede to his client's instructions may not constitute the requisite "cause" necessary to predicate a federal habeas corpus proceeding in which the substantive allegation of error could be reviewed. *See Rose* v. *Lundy*, 102 S.Ct. 1198, 1217 (1982) (Stevens, J., dissenting) ("Since his lawyer found insufficient merit in the two unexhausted claims to object to the error at trial or to raise the claims on direct appeal, I would expect that the Tennessee courts will consider them to have been waived as a matter of State law; thereafter, under the teaching of cases such as *Wainwright* v. *Sykes*, 433 U.S. 72. . . ., they undoubtedly will not support federal relief." (citation omitted) (footnote omitted).)

Thus, the indigent whose access to the courts on direct appeal is thwarted by his own counsel may be foreclosed, for all time, from presenting his claim to any judicial forum. Nothing in the law or the nature of the appellate process will justify the muzzle petitioners wish to construct for the indigent appellant who chooses to be represented by counsel. On the contrary, the

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F.2d 1182 (10th Cir.), *cert. denied*, 434 U.S. 845 (1977) and *Harshaw* v. *United States*, 542 F.2d 455 (8th Cir. 1976), defendant did not instruct his counsel to assert a particular colorable issue on appeal. Similarly, in *Gilbert* v. *Sowders*, 646 F.2d 1146 (6th Cir. 1981), the court of appeals affirmed a writ of habeas corpus where appellate counsel's failure to meet technical filing requirements caused his indigent client's appeal to be dismissed. The issue of a client's insistence that his assigned counsel raise a specific colorable claim was not considered. Nor was the issue considered in *Gustave* v. *United States*, 627 F.2d 901 (9th Cir. 1980), where the court of appeals recognized the principle, unchallenged here, that an attorney need not raise "clearly untenable" issues. 627 F.2d at 906.

client's interest in the outcome gives him an inherent right to be heard.

This is particularly true in light of the well recognized proposition that counsel is fallible. *See, e.g., Engle* v. *Isaac*, 102 S.Ct. 1558. It is not without precedent that an appellate lawyer's failure to address important issues can be so egregious that the Court—departing from basic tenets of appellate practice—is compelled, *sua sponte*, to dispose of the case on the omitted issue. The Court has disposed of cases by resolving issues which counsel had not even raised below or in the certiorari petition. *See generally* R. Stern & E. Gressman, Supreme Court Practice at 459-60 (5th ed. 1978) (and cases cited therein.) *See also Wood* v. *Georgia*, 450 U.S. at 264 n.5 (dispositive conflict of interest issue reached by Supreme Court neither raised on appeal below or included as question in petition for certiorari); *Vachon* v. *New Hampshire*, 414 U.S. 478 (1974); *United States* v. *Evans*, 665 F.2d 54, 55 n.3 (2d Cir. 1981) (Second Circuit reverses and remands conviction on merits without benefit of appellate briefs despite assigned counsel's submission of an *Anders* brief raising an irrelevant frivolous issue); *United States* v. *Alsando*, 486 F.2d 1339 (2d Cir. 1973), *rev'd sub nom., United States* v. *Feola*, 420 U.S. 671 (1975); *Schwander* v. *United States*, 386 F.2d 20 (1967), *rev'd*, 419 F.2d 812 (5th Cir. 1970) (per curiam) (counsel found no issue to appeal, yet two years later the court, *sua sponte*, found an argument of clear merit to which the government confessed error.)

Indeed, the high quality of appellate counsel, upon which petitioners' entire argument is premised, Pet. Br. at 17-18, is contradicted by experience. *See, e.g.*, Burger, *The Special Skills of Advocacy: Are Specialized Training and Certification of Advocates Essential to Our System of Justice?* 42 Ford L. Rev. 227, 234 (1973) ("It would be safer to pick a middle ground and accept as a working hypothesis that from one-third to one-half of the lawyers who appear in the serious cases are not really qualified to render fully adequate representation."); Burger, *A Sick Profession*, 27 FED. B. ASS'N. J. 228 (1967)

("I find no pleasure in saying that the majority of lawyers who appear in court are so poorly trained that they are not properly performing their job . . ."); Kaufman, *Does the Judge Have a Right to Qualified Counsel?*, 61 A.B.A.J. 569 (1975) ("In a recent lecture Chief Judge Bazelon characterized a number of attorneys coming before him as 'walking violations of the Sixth Amendment' "); Kaufman, *The Court Needs a Friend in Court*, 60 A.B.A. J. 175, 176 (1974) ("Judges have been exceedingly troubled by the increasing number of instances of poor legal representation that come to our attention. Chief Justice Burger recognized this in his recent Sonnett lecture. I shall not hazard a guess as to the exact percentage of cases that have suffered from inadequate advocacy, but I can say in my view that it is not insubstantial."); Bazelon, *The Defective Assistance of Counsel*, 42 U. Cinc. L. Rev. 122 (1973) ("I have been told that if my Court were to reverse in every case in which there was inadequate counsel, we would have to send back half the convictions in my jurisdiction."); A. Partridge & G. Bermont, The Quality Of Advocacy In The Federal Courts at 7 (Federal Judicial Center, Aug. 1978) (about one-third of the Judges of the Circuit Courts of Appeals bench believe that there is a serious problem of inadequate appellate advocacy.)

Moreover, to argue that Barnes' dilemma would be no different were he able to retain counsel, Pet. Br. at 19-21, is patently incredible. Without a single citation, petitioners cavalierly conclude that paying clients do not have much control over their retained counsel. Pet. Br. at 20. Petitioners are wrong. If Barnes could have afforded it, he may well have retained a lawyer who would have professionally raised his colorable arguments. Indeed, the ABA, Code Of Professional Responsibility, EC7-4, contemplates as much:

> The advocate may urge any permissible construction of the law favorable to his client, without regard to his professional opinion as to the likelihood that the construction will ultimately prevail.

Experience reveals that retained counsel is often dismissed by a client and replaced with a new attorney. Moreover, the basis

of a client's substitution of retained counsel can be for virtually any reason, including a lack of confidence and trust or even a conflict over strategy and tactics. In contrast, the indigent client has no such alternative.[25]

The petitioners seek to cloak, in paternalistic concern for the welfare of the indigent, their position that he should be precluded from presenting colorable issues not approved by his assigned lawyer.[26] Pet. Br. at 17. The Court addressed and rejected the identical arguments in *Faretta* v. *California*, 422 U.S. at 833-35, on the ground that an individual's choice, even if detrimental to his interests, belongs to him and "must be honored out of that respect for the individual which is the life-blood of the law."

Moreover, in light of the obvious conflict of interest between a criminal defendant and the governmental agency authorized

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[25] While the petitioners go to great lengths to establish that there is no obligation for assigned counsel to raise requested issues, when confronted with the equal protection argument, they reverse gears and concede that counsel's refusal constitutes "good cause," entitling the indigent to new counsel. Pet. Br. at 20-21. Barnes agrees that "good cause" should exist, because, as the Second Circuit observed, counsel has a constitutional duty to advocate the issues urged by his client. Unfortunately, the law in New York and elsewhere conflicts with this construction of "good cause." *See, e.g.*, *Ennis* v. *LeFevre*, 560 F.2d 1072 (appointed counsel's refusal to obtain necessary transcripts for appeal, *held*, insufficient to justify new assigned counsel); *accord*, *High* v. *Rhay*, 519 F.2d 109 (same). In any event, petitioners' suggestion that Barnes could simply have changed counsel is untenable and irrelevant. Barnes cannot possibly be charged with knowing that he could affirmatively move for substitution of assigned counsel. *Cf. Swenson* v. *Bosler*, 386 U.S. at 260 (failure to request appointment of counsel is not tantamount to a waiver of the right to counsel). The attorney assigned to represent Barnes prior to appellate counsel's appointment was substituted pursuant to the court's own motion. J.A. 24. Thus, even if petitioners are correct that substitutions are freely given—a proposition for which no citation is given—unless Barnes was aware of the right, he should hardly be prejudiced by his failure to make a *pro se* motion for substitution.

[26] The Solicitor forwards a similar argument. Sol. Gen. Br. at 26.

to prosecute him, petitioners' attempt to advocate on Barnes' behalf is inherently suspect. The effect of petitioners' position is that the convicted defendant, who has elected to be represented on appeal, would have his constitutionally protected access to an appellate court compromised. The indigent—cognizant of his own inability to act as his own counsel—is forced either to relinquish a possible basis for freedom or, alternatively, to try his own hand at the law through the submission of a *pro se* supplementary memorandum.[27] Plainly, such a submission, even if reviewed by the court, is no substitute for a lawyer's brief. *See, e.g., High* v. *Rhay*, 519 F.2d at 113. Not only does the *pro se* brief underscore to the court that counsel has deemed the issues therein to be irrelevant, the layman's presentation of the colorable issues necessarily minimizes any chance it may have of supporting a favorable appellate disposition. Accordingly, for the indigent to assure that a specific issue be presented to the court, he would have no choice under the petitioners' view other than by proceeding *pro se*—even as to those issues which counsel would have been willing to raise.[28]

Beside the point is petitioners' further contention, Pet. Br. at 17, that "preferred" appellate practice may suggest to counsel that certain colorable issues should be waived so as not to weaken stronger arguments. The Second Circuit opinion does nothing to undermine the validity of that position and the value of counsel's judgment in making that decision. In the vast majority of cases, the client chooses without hesitation to follow his attorney's advice. Where a client suggests an issue

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[27] Nothing in the Rules of the Appellate Division of the New York Supreme Court authorizes the submission of supplementary submissions. Thus, unless the indigent fires his counsel and proceeds *pro se*, it is left to the court's discretion as to whether his brief will be accepted.

[28] This is because, as the Solicitor recounts, a defendant is not entitled to hybrid representation. *See, e.g., United States* v. *Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981); *United States* v. *Trappell*, 638 F.2d 1016, 1027 (7th Cir. 1980).

which counsel believes should not, under "preferred practice," be included in the brief, he may well convince his client that the issue should be waived.[29] However, in the very few instances where the client, contrary to his assigned lawyer's advice, nevertheless wants to press a colorable issue, no sound argument can support counsel's overriding his client's instructions.[30]

Ironically, counsel on Barnes' direct appeal declined to exercise the professional judgment upon which petitioners rely to justify the rejection of the issues Barnes requested. At no time did counsel determine that the issues were inconsistent or inclined to weaken the arguments counsel intended to make.[31] Nor did counsel consult with Barnes or try to persuade him that it was not in his interest to urge the additional grounds for reversal. Indeed, on the contrary, counsel avoided the very

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[29] Accordingly, petitioners' and the Solicitor's reliance on various judges' and scholars' views that selectivity of issues affects the persuasiveness of an appellate brief need not be addressed. It should be noted, however, that no applicable court rule limits the number of issues which may be raised. Moreover, as one appellate court analyst has noted: "Perhaps criminal cases are an exception to the general rule. Defense counsel, including perhaps and particularly appointed counsel, deem it their obligation to raise every possible contention, in part to avoid being charged with not having fulfilled their duty to an indigent client." R. Stern, Appellate Practice In The United States at 283 (1981); *Marer, supra*, at 342-43 (arguing appellate counsel should raise all legal issues which can support reversal). *See also Polk County* v. *Dodson*, 102 S.Ct. 445, 452 ("Although a defense attorney has a duty to advance all colorable claims and defenses, the canons of professional ethics impose limits on permissible advocacy.")

[30] The Solicitor argues that the performance of appellate counsel cannot be constitutionally challenged because an "outside observer" believes other non-frivolous arguments could have been made. Sol. Gen. Br. at 15. Barnes was hardly an "outside observer"; it was *his* appeal, and his right to be heard.

[31] Counsel's rejection of the issues was based on his erroneous conclusion that they were not supported by the record. See *infra* at ____.

responsibility that petitioners entrust to him, and urged Barnes to file his own *pro se* briefs:

> Your supplementary brief will, ho ever, hopefully be submitted for the consideration by the Appellate Division.

J.A. 28.

The error was compounded by appellate counsel's refusal to address Barnes' issues on oral argument—even though the prosecutor's office had argued against the issues in its brief. J.A. 70, 53-69. In addition, counsel, who failed to send the prosecutor's brief to Barnes until after oral argument, thereby eviscerated his client's right to reply.[32] J.A. 70. Thus, although the prosecutors responded to Barnes' issues, Barnes was deprived of any opportunity—with or without the assistance of counsel—to address the prosecutor's arguments either orally or in writing. The net effect was that Barnes was deprived of full access to the appellate courts with the assistance of counsel.

Petitioners urge a result which will not only undermine the attorney-client relationship, but also thwart the indigent's ability to be heard in court. Judge Oakes' opinion below was designed to protect the indigent's access to the courts and to assure that the indigent has full faith in his assigned counsel's efforts on his behalf. As Justice Powell observed in *Polk County* v. *Dodson*, "Our adversary system functions best when a lawyer enjoys the wholehearted confidence of his client." 102 S.Ct at 453 n.17.

B. It Is Beyond Dispute That Barnes Instructed His Assigned Counsel To Raise Certain Claims On Appeal; Moreover, The Second Circuit Was Correct In Finding Those Claims To Be Colorable.

By focusing on only part of the record, petitioners erroneously contend that Barnes did not instruct his counsel to

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[32] *See* N.Y. Civ. Prac. Law § 5528(c) (McKinney 1978); Rules of the Supreme Court, Appellate Division, Second Dep't, Section 670.20(c) (1978).

raise certain colorable issues on appeal. The Second Circuit, however, correctly found that Barnes did so. This finding is confirmed in Barnes' sworn statement submitted in conjunction with his application for a writ of habeas corpus. There, Barnes alleged:

> Assigned counsel and Petitioner [Barnes] communicated Via [sic.] correspondence. On or about November 7, 1977, the Petitioner wrote counsel a letter *specifying the points of law he wished raised on appeal.*

J.A. 80 (emphasis added). Thereafter, Barnes reemphasized his assigned counsel's refusal to raise and argue the points in his *pro se* briefs. J.A. 86. None of Barnes' allegations was in the slightest controverted in the State's opposing affidavit filed in district court. J.A. 92-97. Nor did the State include any contrary affidavit of Barnes' appellate lawyer in its opposition to the petition for a writ of habeas corpus. Moreover, while Barnes' November 7, 1977 letter to counsel is not in the record, his unrebutted sworn statement as to its contents (as well as the contents of any communication which may have occurred subsequent to November 9, 1977) refutes petitioners' after-the-fact speculation that Barnes did not instruct his counsel to raise specific issues.[33] See, e.g., Pet. Br. at 5 n.7, 10, 23-26, 27, 33.

Also incorrect is petitioners' argument that the issues requested by Barnes were frivolous.[34] The Second Circuit was

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[33] Petitioners' speculation that some of the issues Barnes instructed his counsel to raise may have originated with counsel is irrelevant. See, e.g., Pet. Br. at 25, 31, 32. Surely a convicted defendant retains the right to decide whether to appeal, for example, even if he first learned of the right from his counsel. Thus, the origination of the specific issues Barnes wanted his counsel to raise should in no way interfere with his right to have those issues presented to an appellate court. Moreover, once an appellate lawyer is instructed to present a particular colorable issue, it is incumbent on him to marshal every factual and legal argument in support of it.

[34] Indeed, petitioners in their brief cannot consistently maintain that the issues are without merit. Pet. Br. at 12, 27 n.22, 30 (omitted issues were "barely" colorable, non-frivolous and claim had "slim chance of success on appeal.")

unanimous in holding that Barnes instructed his counsel to raise colorable issues on appeal.[35] Pet. App. at 16a (majority opinion), 24a (dissenting opinion). The plain fact is that Barnes' opportunity for a state court reversal would have been greatly enhanced had a trained attorney presented, as Barnes had asked him to, the arguments regarding the ineffective assistance of his trial counsel and the trial court's refusal to charge the jury on accessorial liability.

1. Ineffective Assistance Of Trial Counsel Was A Colorable Argument For Relief On The Direct Appeal From Conviction

In measuring the nonfrivolous nature of the ineffective assistance of trial counsel argument, it is important to note that the New York State courts apply a "reasonable competence" standard in evaluating such claim. *See, e.g., People* v. *Bell*, 48 N.Y.2d 933, 401 N.E.2d 180, 425 N.Y.S.2d 57 (1979). In *People* v. *Droz*, 39 N.Y.2d 457, 348 N.E.2d 880, 384 N.Y.S.2d 404 (1976) the New York Court of Appeals first articulated the reasonable competence standard:[36]

> [I]t is elementary that the right to effective representation includes the right to assistance by an attorney who has taken the time to review and prepare both the law and

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[35] It is conceded that to the extent that any of Barnes' [illegible]sues were deemed by counsel to be frivolous, counsel need not, of course, have raised them. See Pet. Br. at 18. A lawyer should certainly eval[illegible]his client's suggestions and ferret out those issues which, were he [illegible]s them, would violate the ethical canons. *See Polk County* v. [illegible] S.Ct. at 452; *Anders* v. *California*, 386 U.S. 738; *see generally* Hermann, *Frivolous Criminal Appeals*, 47 N.Y.U.L. Rev. 701 (1972); Uviller, *Zeal and Frivolity: The Ethical Duty of the Appellate Advocate To Tell the Truth About the Law*, 6 Hofstra L. Rev. 729 (1978); Carrington, *The Right to Zealous Counsel*, 1979 Duke L.J. 1291.

[36] Contrary to petitioners' assertion that the sham and mockery standard applied to Barnes' direct appeal, Pet. Br. at 27 n.22, the less stringent New York standards measuring ineffectiveness of counsel was announced by the Court of Appeals more than two years prior to Barnes' 1978 appeal to the

> facts relevant to the defense . . . and who is familiar with, and able to employ at trial basic principles of criminal law and procedure . . . Whether counsel has adequately performed these functions is necessarily a question of degree, in which cumulative errors particularly on basic points essential to the defense are often found to be determinative . . .

39 N.Y.2d at 462 (citations omitted).

In a sworn memorandum which was sent to appellate counsel well in advance of the appeal, Barnes claimed that his trial counsel never adequately prepared or investigated his case. J.A. 15. The failure of preparation converts the fundamental right to the assistance of counsel to a hollow protection. As the Supreme Court observed in *Avery* v. *Alabama*, 308 U.S. 444 (1940):

> [T]he denial of opportunity for appointed counsel to confer, to consult with the accused and to prepare his defense, could convert the appointment of counsel into a sham and nothing more than a formal compliance with the Constitution's requirement that an accused be given the assistance of counsel.

Id. at 446 (footnote omitted); *see Morrow* v. *Parratt*, 574 F.2d 411, 412-14 (8th Cir. 1978); *People* v. *Gonzalez*, 47 N.Y.2d 606, 616, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979); *People* v. *Droz*, 39 N.Y.2d at 462-63; *People* v. *Bennett*, 29 N.Y.2d 462, 280 N.E.2d 637, 329 N.Y.S.2d 801 (1972); *People* v. *Gega*, 69

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appellate division. Accordingly, as discussed above, *supra* at 7, the fact that Barnes, *pro se*, raised the issue of ineffective assistance of counsel in a prior federal habeas corpus proceeding is of no moment. The district court analyzed Barnes' claim in light of the higher Second Circuit standard and not the state law which would have governed Barnes' direct appeal. Pet. App. at 6a. *See generally People* v. *Aiken*, 45 N.Y.2d 394, 398, 380 N.E.2d 272, 408 N.Y.S.2d 444 (1978) (citing New York cases which rejected the "farce and mockery" standard long before Barnes' direct appeal was heard); *People* v. *Baldi*, 76 A.D.2d 259, 281-83, 429 N.Y.S.2d 667, 691-92 (2d Dep't 1980), *rev'd on other grounds*, 54 N.Y.2d 137, 429 N.E.2d 400, 444 N.Y.S.2d 893 (1981) (same).

A.D.2d 772, 415 N.Y.S.2d 26 (1st Dep't 1979). *See generally Bazelon, The Defective Assistance of Counsel*, 42 U. Cinc. L. Rev. 1 (1973).

The basis of Barnes' legal challenge was apparent on the face of the record. For example, a last minute "crisis decision" in the course of trial to pursue an alibi defense bears out Barnes' allegation.[37] Moreover, counsel's failure to object to the prosecutor's improper cross-examination of Barnes—an issue Barnes specifically urged upon his appellate lawyer—unnecessarily allowed this harmful evidence to be heard by the jury. *See People* v. *Reingold*, 44 A.D.2d 191, 353 N.Y.S.2d 978 (4th Dep't 1974) (reversing, *inter alia*, because of prosecutor's improper use of the details of a prior conviction on cross-examination).

Furthermore, trial counsel's failure to obtain a curative instruction for the numerous and highly prejudicial court intrusions permitted this obvious bias to influence the jury. *See, e.g, People* v. *Charleston*, 56 N.Y.2d 886, 887, 438 N.E.2d 1114, 453 N.Y.S.2d 399 (1982); *People* v. *Broady*, 5 N.Y.2d 500, 516, 158 N.E.2d 817, 186 N.Y.S.2d 230 (1959); *People* v. *Jackson*, 30 A.D.2d 983, 294 N.Y.S.2d 79 (3d Dep't 1968), *aff'd*, 28 N.Y.2d 757, 269 N.E.2d 913, 321 N.Y.S.2d 370 (1971).

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[37] The trial record reflects trial counsel's lack of preparation. Although the defense theory rested on consistent contentions of the complainant's erroneous identification and alibi, the record demonstrates that trial counsel plainly did not plan his case. Indeed, in the midst of the trial, and immediately before Barnes took the stand, the following colloquy took place:

> THE COURT . . . What are you going to do now?
>
> MR. SCHMUCKLER . . . And at this point the defendant and I make a quick decision at this point. [sic.]
>
> THE COURT . . . You have had all the time you will get. You have had a day and a half to make your decision. We've adjourned it so that you can go to Pittsburgh Friday afternoon. We adjourned all day yesterday. (Whereupon defendant and counsel confer.)

T. 96.

Similarly, trial counsel failed even to lodge an objection during the prosecutor's highly inflammatory and prejudicial summation. The assistant district attorney repeatedly offered his own opinion to Barnes' veracity:

> But I would ask [the jury] this, you evaluate him. Does he have an interest in the outcome? Is he more apt to lie than Butts? You better believe it, you better believe it, you better believe it. . . . He made himself out to be what he is, a thief, liar and a cheat.

T. 159-60. The prosecutor's closing was improper and trial counsel's permitting it to go to the jury unchallenged infected his client's ability to receive a fair verdict. *See, e.g., People* v. *Wallason*, 62 A.D.2d 1026, 404 N.Y.S.2d 23 (2d Dep't 1978); *People* v. *Butler*, 57 A.D.2d 931, 932, 395 N.Y.S.2d 36 (2d Dep't 1977).

In addition, trial counsel's failure to call or subpoena Barnes' father to corroborate the alibi defense constitutes error of a constitutional dimension. *See, e.g., People* v. *Detling*, 73 A.D.2d 937, 937-38, 423 N.Y.S.2d 509 (2d Dep't 1980) (judgment of conviction reversed for ineffective assistance of counsel, *inter alia*, because of counsel's "failure to call the defendant's father as an alibi witness at trial despite the fact that the father had testified before the Grand Jury that the defendant was at home with him at the time of the alleged burglary"); *People* v. *Zayas*, 61 A.D.2d 594, 598, 403 N.Y.S.2d 519 (1st Dep't 1978) ("Although the evidence was ample to sustain the conviction . . . the failure to take appropriate steps to obtain the out-of-State alibi witnesses deprived defendant of the fair trial to which he was entitled.")[28]

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[28] The petitioners' effort to distinguish *Detling* and *Zayas*, Pet. Br. at 28, is unconvincing. In both cases the failure of counsel to call alibi witnesses was fatal to the convictions. In *Zayas*, the defendant testified that he was in New Jersey at the time the criminal act allegedly took place in New York. Trial counsel stated on the record that he tried to obtain out of state alibi witnesses, each of whom refused to appear. Counsel further admitted that he was unaware of the statutory procedure which could have been used to compel

To the extent that appellate counsel believed the record needed amplification on this issue he had a duty, armed with Barnes' sworn statements regarding his trial lawyer's failure to investigate and failure to call alibi witnesses, to open the trial record. This procedure assures that Barnes would receive a full and fair review of his legal claims. *See People* v. *Frisbie*, 65 A.D.2d 954, 410 N.Y.S.2d 481 (4th Dep't 1978); ABA, Standard For Criminal Justice, Criminal Appeals, Commentary at 21.43 ("The primary responsibility of appellate counsel is, of course, to perform the professional duties necessary to an appeal. The standard adds a broader set of duties for appellate counsel, however. Counsel should examine the whole case of the client represented, not only for purposes of the appeal, but also to take up, evaluate, and pursue any question that might affect the validity of the judgment of conviction and sentence. For example, issues may exist that can be raised only by a postconviction proceeding and that ought to be presented to the trial court before the pending direct appeal matures. It is in the client's interest to obtain a complete and final determination of the entire case as expeditiously as possible. That is also in the public interest. Therefore, counsel on appeal should not be confined merely to the prosecution of the appeal if there are other aspects of the case that ought to be explored first."); Marer, *supra* at 343 *et seq*.

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the witnesses' appearances. The appellate court held that the failure to take the steps necessary to obtain the witnesses deprived the defendant of a fair trial. This disposition was reached even absent any indication on the record that the witnesses would have, in fact, affirmed the defendant's story. In *Detling*, although the alibi witness had testified in the grand jury, trial counsel was held to have performed inadequately by failing to call the witness even though there was no showing on the record that the witness was available at the time of the trial. The same result should have been urged by appellate counsel in accordance with Barnes' instruction. Barnes testified that he was at home with his father and his father's girlfriend. See *supra* at 3. Barnes was entitled to have these witnesses called at trial.

Finally, trial counsel's failure to present an offer of proof as to the relevance of psychiatric evidence indicating the complainant's history of "blacking-out" deprived the trial court of any basis on which to admit the evidence. T. 59. Certainly, evidence relevant to the complainant's mental condition at the time about which he is testifying is admissible at the very least on the issue of credibility. *People* v. *Rensing*, 14 N.Y.2d 210, 212-14, 199 N.E.2d 489, 250 N.Y.S.2d 401 (1964); *see People* v. *Acklin*, 102 Misc.2d 596, 424 N.Y.S.2d 633 (Sup. Ct. 1980).

The importance of the psychiatric history was amplified by the fact that the State presented essentially a "one-witness" case. The exclusion of evidence probative of the complainant's inability to identify his assailant from the jury's consideration may have been fatal to Barnes' defense. That the exclusion resulted from trial counsel's deficient performance was emphasized by Judge Nickerson in Barnes' prior habeas corpus proceeding:

> *In the instant case, counsel did not demonstrate how the black-out suffered by the witness at some indeterminable time prior to the incident might have affected his perception at the time he was robbed or rendered his in-court testimony suspect.* Therefore, the trial judge did not abuse his discretion in ruling that counsel's question was not relevant.

Barnes v. *Jones*, 78 C 1717 (E.D.N.Y. November 28, 1978), Appendix II to Pet. Br. at 9a (emphasis supplied). In light of Judge Nickerson's opinion, the petitioners' argument that trial counsel made the required offer of proof, Pet. Br. at 29, is rather curious. Moreover, to argue that, to the extent the offer was incomplete, it was a result of insufficient medical knowledge misses the point. Counsel failed to connect a prior black-out with the complainant's perception at the time of the incident. Thus, the deficiency was legal not medical. The district court's decision compels a conclusion that Barnes' claim of ineffectiveness of trial counsel is "colorable." Petitioners' suggestion that appellate counsel simply addressed this issue as a court error, Pet. Br. at 18, as opposed to counsel's error,

misses the mark.[39] Unless there was a proper offer of proof, the trial court's discretion, as Judge Nickerson recognized, in excluding the evidence could not be challenged.

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[39] Significantly, Barnes' assigned counsel failed to meet even the petitioners' threshold standard for constitutionally permissible appellate advocacy. After reviewing Barnes' November 7, 1977 letter in which Barnes demanded that certain issues be raised on his behalf, counsel refused to follow his client's direction. Of critical importance is the basis of counsel's refusal; appellate counsel would not raise Barnes' ineffective assistance of trial counsel issue because

> New facts, or new factual arguments, that existed and were readily determinable at the time of trial, are not of assistance to us at this time.

J.A. 27. Appellate counsel's statement plainly demonstrates a misapprehension of applicable New York law. The issue of ineffective assistance of trial counsel may in fact be raised on direct appeal. *See, e.g., People* v. *Gonzalez*, 47 N.Y.2d at 607 (New York Court of Appeals reversing and remanding conviction on direct appeal based on a finding of ineffective assistance of appellate counsel in the intermediate appellate court); *People* v. *Frisbie*, 65 A.D.2d at 954 (defendant's sworn statement on direct appeal, raising issues of ineffectiveness of trial counsel, sufficient to remand case for an evidentiary hearing pending appeal). Certainly, refusing to raise the issue because of a direct misapprehension of law—as opposed even to a claimed exercise of tactic or strategy—cannot conceivably rise to the level of competent representation. *See, e.g., Cuyler* v. *Sullivan*, 446 U.S. at 344; *Tollett* v. *Henderson*, 411 U.S. 258, 264 (1973); *Rodriquez* v. *United States*, 395 U.S. 327; *Via* v. *Superintendent*, 643 F.2d 167 (4th Cir. 1981) (counsel's ignorance of law and facts held to constitute ineffectiveness of counsel); *United States* v. *Hinton*, 631 F.2d 769, 780 (D.C. Cir. 1980) ("Counsel's choices [must] be 'the product of a deliberate and informed decision, not oversight or inadvertence.' ") (footnote omitted); *Sincox* v. *United States*, 571 F.2d at 877-879 (failure of retained counsel to object out of "ignorance" when poll of jury indicated a juror's reasonable doubt, and subsequent failure to respond to client's request for mistrial and appeal, amounts to denial of effective assistance of counsel); *United States* v. *Goodwin*, 531 F.2d 347, 350-52 (6th Cir. 1976) (counsel's ignorance of elements of crime held to be ineffective assistance of counsel); *Corsa* v. *Anderson*, 443 F. Supp. 176, 178 (E.D. Mich. 1977) (counsel's failure based on error, not strategy, to object to unconstitutional charge constitutes ineffective assistance of counsel). Thus, petitioners' analysis that appellate counsel simply recasted the psychiatric evidence issue as trial court error is unavailing. Counsel's decision was undoubtedly not the product of tactic, but rather, it was based on his erroneous belief that the appellate court could not review the error were it to be characterized as a

Thus, the record is replete with examples of trial counsel's failure to come forward with exculpatory evidence or to correct the improper and prejudicial conduct of both the judge and the prosecutor. In a case in which the prosecutor relied exclusively on the testimony of one witness, whose credibility had been devastatingly impeached, each of counsel's errors, alone would have supported the incompetence issue. *See, e.g., Commonwealth* v. *Valle*, 240 Pa. Super. 411, 414-15, 362 A.2d 1021 (1976) (holding ineffectiveness based on trial counsel's failure to object to prosecutor's jury argument calling defendant "vicious" and a "liar"); ABA, Project On Standards For Criminal Justice, *The Prosecution Function* § 5.8 (b, c & d)(1971). Together, the cumulative effect of the various deficiencies in his performance was likely to mandate reversal.[40] *Cf. United States* v. *Guglielmini*, 384 F.2d 602, 607 (2d Cir. 1967), *cert. denied*, 400 U.S. 820 (1970).

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result of ineffective assistance of trial counsel. Appellate counsel's choice was especially deficient in that his characterization of the issue as court error could only be successful were he to establish the propriety of trial counsel's wholly insufficient offer of proof. See Appendix II to Pet. Br. at 9a.

[40] Petitioners' argument that trial counsel's failure to object did not preclude appellate counsel from raising the substantive issues, Pet. Br. at 30 n.25, is misleading. N.Y. Crim. Proc. Law § 470.05(2) (McKinney 1981). Moreover, notwithstanding N.Y. Crim. Proc. Law § 470.15(3)(c) & (6)(a) (McKinney 1981), relied upon by the petitioners, Pet. Br. at 30 n.25, there is no assurance that the appellate division would have entertained review on the ground that the error was not properly preserved. *See, e.g., People* v. *Shields*, 58 A.D.2d 94, 97, 395 N.Y.S.2d 476 (2d Dep't 1977), *aff'd*, 46 N.Y.2d 764, 386 N.E.2d 257, 413 N.Y.S.2d 649 (1978) (personal opinion); *People* v. *Brown*, 43 A.D.2d 743, 350 N.Y.S.2d 717 (2d Dep't 1973), *aff'd*, 35 N.Y.2d 916, 324 N.E.2d 368, 364 N.Y.S.2d 900 (1974) (prosecutor's own veracity and position). Indeed, for example, in response to Barnes' *pro se* challenge to the prosecutor's unfair summation, the State argued that the absence of objection foreclosed the issue from review. J.A. 66.

2. The State Trial Court's Refusal Adequately To Charge On The Law Of Accessorial Liability Raised A Colorable Claim For Appellate Review

As the Second Circuit correctly observed, Pet. App. at 16a, the trial court refused to charge the jury that Barnes could only be found guilty of the crimes were it found that he possessed the requisite intent and knowledge of those who committed the criminal acts. See *supra* at 4. A defendant is entitled to an instruction if it is supported by the evidence and sets out a correct declaration of applicable legal standards. *See, e.g., United States* v. *Manning*, 618 F.2d 45, 47-48 (8th Cir. 1980) (and cases cited therein); *People* v. *Wrench*, 34 A.D.2d 1055, 1056, 312 N.Y.S.2d 561 (3d Dep't 1970). *See generally* 1 Devitt & Blackmar, Federal Jury Instructions at 331-32 (3d ed. 1977). An accessorial liability charge was clearly appropriate given the facts elicited during the trial.

The robbery statute under which Barnes was convicted requires a "forcible stealing." N.Y. Penal Law § 160.00 (McKinney 1975). Because there was an utter failure on the prosecution's part to establish that Barnes personally stole the complainant's property, the guilty verdict could only have been predicated on a theory of accessorial liability. Under § 20.00 of the N.Y. Penal Law (McKinney 1975), Barnes would only be criminally liable for his cohorts' conduct were he to have acted with the mental culpability required for the commission of robbery. Certainly, the evidence at trial was sufficient to establish a defense theory that the act of stealing concededly committed by others may not be attributed to Barnes. The failure to so charge the jury unduly prejudiced Barnes' *bona fide* defense.

The prosecution tries, unsuccessfully to "transpose" one of the trial court's instructions into the one which it erroneously refused to give. Pet. Br. at 31-32. Trial counsel sought to have the jury charged that Barnes could only be convicted on an accessorial theory if it were proven that he knew of his alleged accomplices' acts and intended the result. The focus of the request to charge was "knowledge," T. 188; in light of the facts

adduced at trial, the proposed instruction was entirely proper, and its omission may have seriously misled the jury. Pet. App. at 16a. *People* v. *LaBelle*, 18 N.Y.2d 405, 412-13, 222 N.E.2d 727, 276 N.Y.S.2d 105 (1966); *People* v. *Howard*, 75 A.D.2d 1007, 429 N.Y.S.2d 131 (4th Dep't 1980). *See also United States* v. *MacDougal-Pena*, 545 F.2d 833, 836 (2d Cir. 1976) (in aiding and abetting cases, charge regarding presence and guilty knowledge should be given whether requested or not); *United States* v. *Garguilo*, 310 F.2d 249, 254 (2d Cir. 1962) (Friendly, J.) (same).

Petitioners distort the record in arguing that the trial court's "baseball team" instruction was sufficient to cover trial counsel's requested charge. Pet. Br. at 31-32. The thrust of the charge, T. 176, was that a center fielder is a part of a baseball team regardless of whether he catches any balls. Thus, the trial judge continued, if two or more people take part in the commission of a crime, each is equally guilty regardless of the extent of his participation. T. 176.

The problem with this charge, however, is that the trial court never instructed the jury on how one becomes a "member of the team." Surely, mere presence on the playing field is not enough, *see, e.g.*, *United States* v. *Berenguer*, 562 F.2d 205, 209 (2d Cir. 1977), and, accordingly, trial counsel's proposed instruction directed at the need to establish guilty knowledge and acceptance of the community purpose was essential. *See People* v. *LaBelle*, 18 N.Y.2d at 412-13.

Moreover, the trial court's intent charge,[41] also relied upon by the petitioners as being sufficient to cover trial counsel's requested instruction, Pet. Br. 31-32, was the equivalent of the

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[41] The trial court's charge read:

> It is a fundamental rule in evidence that a person is presumed to intend the natural consequences of his act, unless the act was done under circumstances or conditions which preclude the existence of such intent.

T. 177.

charge which the Court condemned in *Sandstrom* v. *Montana*, 442 U.S. 510 (1979). The charge, as given, impermissibly shifted the burden of proof to Barnes by allowing the jury to presume Barnes' intent from the natural consequences of his act. T. 177. *See, e.g., People* v. *Getch*, 50 N.Y.2d 456, 464-65, 407 N.E.2d 425, 429 N.Y.S.2d 579 (1980).

C. Appellate Counsel's Refusal To Raise The Colorable Issues Urged By His Client Is Inherently Prejudicial And The Writ Of Habeas Corpus Was Properly Granted.

Where a defendant is deprived of the assistance of counsel in prosecuting a direct criminal appeal, courts have consistently found error of constitutional magnitude regardless of the likelihood of success on the merits. *See, e.g., Hollis* v. *United States*, 687 F.2d 257, 259 (8th Cir. 1982); *Robinson* v. *Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981), *citing, inter alia, Rodriquez* v. *United States*, 395 U.S. 327, 330 and *Williams* v. *United States*, 402 F.2d 548, 552 (8th Cir. 1968); *United States* v. *King*, 664 F.2d 1171, 1172-73 (10th Cir. 1981); *United States* v. *Golub*, 638 F.2d 185, 187-88 (10th Cir. 1980); *High* v. *Rhay*, 519 F.2d 109, 113; *Horsely* v. *Simpson*, 400 F.2d 708, 712-13 (5th Cir. 1968). *See also Cuyler* v. *Sullivan*, 446 U.S. 335, 349-50 (demonstration of prejudice unnecessary where actual conflict exists at trial); *Glasser* v. *United States*, 315 U.S. 60, 75-76. Indeed, the Court in *Rodriquez* held that a defendant could establish that he was impermissibly denied counsel based on the failure to file a notice of appeal without even specifying the errors which should have been raised:

> Those whose right to appeal has been frustrated should be treated exactly like any other appellants; they should not be given an additional hurdle to clear just because their rights were violated at some earlier stage in the proceedings. Accordingly, we hold that the courts below erred in rejecting petitioner's application for relief because of his failure to specify the points he would raise were his right to appeal reinstated.

395 U.S. at 330. *See also Miller* v. *McCarthy*, 607 F.2d 854, 857 (9th Cir. 1979); *United States ex rel. Randazzo* v. *Follette*, 444

F.2d 625, 629 (2d Cir.), *cert. denied*, 404 U.S. 916 (1971); *Kent* v. *United States*, 423 F.2d 1050, 1051 (5th Cir. 1970); *Collins* v. *United States*, 418 F. Supp. 577, 582 (E.D.N.Y. 1976).

In *Entsminger* v. *Iowa*, 386 U.S. 748, the Court held that the failure of an indigent defendant's appointed counsel to file the entire record on appeal constituted a constitutional violation:

> Such procedure automatically deprived [petitioner] of a full record, briefs and arguments on the bare election of his appointed counsel, without providing any notice to him or to the reviewing court that he had chosen not to file the complete record in the case. By such action "all hope of any [adequate and effective] appeal at all" . . . was taken from the petitioner.

386 U.S. at 752 (citations omitted).

Certainly, the mere filing of a notice of appeal and transcript is wholly insufficient to meet the letter and spirit of *Anders* and its progeny. In *Robinson*, the Eighth Circuit affirmed a grant of a habeas corpus petition where, although a notice of appeal was filed, the brief submitted on the appellant's behalf was "flagrantly deficient." The court of appeals found that the quality of the brief amounted to an effective abandonment of the appeal. 635 F.2d at 759. Plainly, Barnes' counsel's refusal to raise certain colorable issues is tantamount to an abandonment of his client, thereby requiring no showing of prejudice.[42] Indeed, the "actual prejudice" standard of *Wainwright* v. *Sykes*, 433 U.S. 72 and *United States* v. *Frady*, 102 S.Ct. 1584 (1982), Pet. Br. at 33-34, to the extent it is applicable, is met on

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[42] Petitioners concede that no showing of prejudice is needed in deprivation of counsel cases. Pet. Br. at 34. However, petitioners, in order to avoid this principle, attempt to recharacterize Barnes' claim as being one addressed to the *effectiveness* of counsel as opposed to deprivation of counsel. *Id.* The recharacterization is wrong. Barnes was deprived of any assistance of counsel with regard to legal errors—specified by Barnes—which may have resulted in a reversal of his conviction. This effective abandonment firmly places Barnes within the ambit of *Anders* and *Douglas*, thus requiring no additional showing of prejudice.

the face of Barnes' present challenge. By definition, the colorable claims were capable of supporting a reversal of his conviction. Barnes was constitutionally entitled to have the appellate division, on direct appeal, consider these points as presented by an attorney. The *actual* harm suffered by Barnes was inherent in his counsel's refusal to present the claims and thus is presumptively prejudicial. As a habeas corpus petitioner challenging his conviction may establish "actual prejudice" by showing that, absent the error, there would have been a reasonable doubt, *see Wainwright* v. *Sykes*, 386 U.S. at 24; Goodman & Salett, *Wainwright* v. *Sykes: The Lower Federal Courts Respond*, 30 Hastings L.J. 1683, 1694-1707 (1979) (and cases cited therein), by analogy, omitting from appellate consideration issues which may have supported a reversal necessarily meets the actual prejudice standard.

The fact the Barnes was abandoned in his efforts to obtain appellate review of the issues he urged upon his counsel is sufficient, without more, to support the issuance of the writ of habeas corpus. However, even were the Court to measure the constitutional error against some other standard of "actual prejudice," the particular facts of this case establish that Barnes is nevertheless entitled to the relief ordered by the court of appeals.

As demonstrated above, the issues Barnes wanted to have advocated were of substantial merit. Although the court of appeals simply confirmed that the issues were colorable, an appellate court considering the substantive merits of the issues would have reversed Barnes' judgment of conviction. The prosecution's case at trial was weak; its only witness had committed perjury and the only evidence of robbery against Barnes was accessorial. Illustrative of the weakness of the State's case was the prosecutor's offer at the close of his case to allow Barnes to plead to a lesser offense and a substantially reduced sentence. In this context, the improper accessorial liability charge so deviated from the required instruction that it deprived Barnes of a fair trial. Moreover, the cumulative effect of trial counsel's performance—his inability to introduce

exculpatory evidence and exclude improper testimony as well as his allowance of biased and prejudicial conduct by the judge and prosecutor—deprived Barnes of a fair chance of trial.

The court of appeals' remedy herein—an alternative of release from custody or opportunity for a new direct appeal—finds support in the Court's disposition of cases in which sixth amendment violations are established. As Justice White recently observed:

> Cases involving Sixth Amendment deprivations are subject to the general rule that remedies should be tailored to the injury suffered from the constitutional violation and should not unnecessarily infringe on competing interests.

United States v. *Morrison*, 449 U.S. 361, 364 (1981). The remedy fashioned by the court of appeals will assure that Barnes receives, for the first time, a full and fair review of colorable issues he asked in vain for his counsel to advocate.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted,

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SWORN TO BEFORE ME THIS
DAY 4 of SEPT 1950

James L Farrell Jr
Notary Public

JAMES L FARRELL JR.
Notary Public, State of New York
No. 41 1166350
WARREN County
Commission Expires March 30, 1951

David Barnes

[Notarization of David Barnes' signature omitted from J.A. at 91.]

Petitioner's Reply Brief

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No. 81-1794

IN THE

Supreme Court of the United States

October Term, 1982

EVERETT W. JONES, Superintendent, Great Meadow Correctional Facility and the State of New York,
Petitioners,

—against—

UNITED STATES OF AMERICA *ex rel.* DAVID BARNES,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITIONERS' REPLY BRIEF

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PETITIONERS' REPLY BRIEF

ARGUMENT

I. The *Per Se* Rule Created By The Second Circuit Requires An Unworkable And Unproductive Effort To Reconstruct And Interpret The Discussions, Suggestions, And Requests That Constitute Attorney-Client Communications.

In this case, the Court of Appeals for the Second Circuit has held that on appeal from a criminal conviction, an assigned appellate attorney is constitutionally obligated to present every nonfrivolous issue that is requested by the defendant, even if professional judgment would require omitting the issue from the appeal. On the other

hand, in the absence of a request from the defendant, there is no such obligation to present every nonfrivolous issue. Therefore, in order to implement the rule it is essential to distinguish between requests, which trigger the application of the rule, and suggestions or discussions, which do not.

In an attempt to convince this Court that he has satisfied the request requirement of the rule, defendant now seeks to rely on extra-record materials (Resp. Br. at 32 and 39 n.39), and an unsupported allegation found in the memorandum of law which he submitted *pro se* to the district court (J.A. 80, 86). These attempts to manufacture a request, where one does not exist, must fail.

First, defendant implies that his position is supported by attorney-client communications which were not presented to the courts below and whch are not part of the record on appeal. Defendant's reliance on hypothetical documents which have not been subjected to judicial scrutiny is wholly improper.[1] *See* U.S. Sup. Ct. Rule 30(1), 28 U.S.C.A.

Second, defendant seeks to rely on his *habeas corpus* petition as support for his characterization of his communications with counsel (Resp. Br. at 32), but that effort must also fail. The petition itself, which is the only sworn statement filed by defendant in the federal district court, contains no reference to requests. In the

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[1] Defendant selected the excerpts from the attorney-client correspondence which he appended to the petition for a federal writ of *habeas corpus* which underlies this appeal. The documents he selected do not support his position. The entire file of correspondence between defendant and his state appellate attorney has been made available to counsel for both parties in this case, and can be furnished to this Court upon request.

attached memorandum of law, defendant alleged that he had written a letter "specifying the points of law he wished raised on appeal", but that statement is not sworn,[2] and it is in any event merely his retrospective interpretation of his communications with his counsel. Clearly, this Court is not bound by defendant's characterization in determining, as a matter of law, whether the record supports a finding that an unambiguous request was made.[3]

Moreover, defendant's after-the-fact characterization of his communications with his attorney as requests is

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[2] Defendant makes much of the fact that his signature on his memorandum of law was notarized (Resp. Br. at 32). The function of a notary is to verify the signature on a document, and not to verify its contents. Defendant's memorandum of law was not executed under penalties of perjury and therefore lacks evidentiary value. Defendant also questions the propriety of omitting the notarization from the Joint Appendix (Resp. Br. at 8 n.15). The notarization was omitted in compliance with Supreme Court Rule 30(5).

[3] Defendant erroneously suggests that the State admitted the truth of this particular allegation by choosing not to controvert it in the district court. The rules governing federal *habeas corpus* proceedings provide that an answer must respond to the allegations of the petition. 28 U.S.C.A. § 2254, Rule 5. Defendant's petition alleged, without specification, that he had been deprived of effective assistance of appellate counsel in the state courts (J.A. 74-78). Defendant's claim that he instructed his attorney to raise certain issues on appeal appears only in his memorandum of law. Therefore, the failure to deny this factual allegation, buried in a memorandum of law, does not constitute an admission of any fact.

In his memorandum of law, defendant's primary argument was that his attorney had filed a "no-merit" brief in the state appellate court, and the State responded to that argument. Prior to the Second Circuit's holding in this case, no court had held that a request made by a defendant to his counsel was constitutionally significant. Thus, there was no reason to controvert defendant's characterization of the communications as a request.

not persuasive. Defendant strains to create requests from the record by arguing that requests can be found in the *pro se* briefs prepared by defendant, and in the list of issues prepared by the lawyer for consideration (Resp. Br. at 32, n.33). In the absence of any explicit instructions, however, it is absurd to expect that any reasonably competent attorney would have interpreted these items as requests by defendant to have the issues included in counsel's brief.

The absence of an unequivocal request (*see* Pet. Br. 23-33), illustrates both the lack of any real conflict between defendant and his appellate counsel and a major flaw in the Second Circuit's rule. By holding that a request by the client is the pivotal factor in determining whether the representation provided was constitutionally acceptable, the Court of Appeals has created an unworkable rule.[4] The rule requires an in-depth, after-the-fact inquiry into the attorney-client relationship every time a defendant, having lost the appeal, expresses dissatisfaction with a brief prepared by an assigned appellate attorney.

Such an inquiry would include hindsight interpretation of all correspondence between attorney and client, and reconstruction of their in-person and telephone con-

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[4] There is no merit to defendant's concern that the interests of the district attorney's office conflict with the interests of defendants (Resp. Br. at 28-29). The primary interest of the state is to ensure that justice is done, and that requires the provision to defendants of effective assistance of counsel. Moreover, even in its narrow adversarial role, the state has an interest in providing effective assistance of counsel to defendants, because only in that way is it possible to frame issues intelligently for adjudication, and to protect the finality of judgments, thereby avoiding costly and burdensome new trials and appeals. Thus, the state has a strong interest in advocating the rule that in practice best protects the rights of defendants and the effective administration of the criminal justice system.

versations. Depending on the client's choice of words and degree of insistence, what the client may later characterize as a request might reasonably be interpreted by an attorney or court as merely a suggestion. *See Telesco v. Scully*, 541 F. Supp. 822, 827 (S.D.N.Y. 1982) (no violation of *Barnes* rule where petitioner "wanted" but did not "request" a claim). The nature of the inquiry necessitated by the Second Circuit's rule demonstrates the unmanageability of that rule.

Each attorney-client relationship is unique and complex. While a detailed investigation into the relationship could reveal that the client was extremely concerned about a particular issue and repeatedly asked appellate counsel to raise it, such an investigation could as easily reveal that the client withdrew or modified the request, or preferred to present the issue in a *pro se* brief, or ultimately chose to rely on the attorney's judgment as to which issues should be raised on appeal.

In this case, the record shows that appellate counsel understood the arguments contained in defendant's November 7, 1977, letter merely as suggestions (J.A. 27).[5] There is nothing in the record which indicates that defendant disagreed with his attorney's evaluation of these suggestions. After his conviction was affirmed, defendant requested counsel to continue the representation in order to seek permission to appeal to a higher court. Defendant did not register any complaint about counsel's performance until years after the conviction was affirmed. The

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[5] Only one of the suggestions attributed to defendant's letter bears any resemblance to the claims of error which the Second Circuit faulted the state appelate counsel for omitting. This suggestion was a general claim that defendant had received ineffective assistance from his trial counsel. No factual grounds were stated in support of the claim, nor was the nature of the alleged ineffectiveness specified.

record contains no evidence of conflict or neglect; rather, it supports the conclusion that counsel was thorough, conscientious, and sincerely concerned about his client's welfare.

It would seriously distort the attorney-client relationship to find in these events a request that requires counsel to set aside professional judgment and write a brief consisting of a long list of frivolous or barely colorable

II. Counsel's Omission Of Particular Issues From The State Appeal Was A Reasonable Strategic Decision Consistent With The Constitutional Standard For Effective Appellate Counsel.

Defense attorneys are generally under no legal obligation to memorialize their trial or appellate strategy. An explicit statement of strategy is, therefore, seldom found in a trial transcript or appellate brief. Courts routinely scrutinize these documents to determine whether they reflect a reasonable exercise of professional judgment.* If

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* The cases relied on by defendant (Resp. Br. at 39, n.39) do not hold that a decision must be explicitly designated as strategic before a court can so find. In those cases counsel's strategy could not be discerned from the record. Therefore, the courts ordered hearings at which it was determined that counsel had acted out of ignorance, or neglected the client, or prepared inadequately. *United States v. Hinton*, 631 F.2d 769 (D.C. Cir. 1980); *Via v. Superintendent*, 643 F.2d 167 (4th Cir. 1981); *Sinox v. United States*, 571 F.2d 876 (5th Cir. 1978); *United States v. Goodwin*, 531 F.2d 347 (6th Cir. 1976). In one case, *Corsa v. Anderson*, 443 F.Supp. 176 (E.D. Mich. 1977), the parties stipulated that counsel's failure to object was not a strategic decision. In contrast, appellate counsel's strategy in this case is easily discerned from his brief and letter (J.A. 26-42).

they do, then there is no denial of effective assistance of counsel.[7] *Henry v. Mississippi*, 379 U.S. 443, 451-52 (1965); *United States v. Hinton*, 631 F.2d 769, 780 (D.C. Cir. 1980); *United States v. Daniels*, 558 F.2d 122, 126 (2d Cir. 1977).

In this case, appellate counsel's choice of issues was unquestionably a rational strategic decision. Counsel's letter to defendant indicates that he considered and researched numerous potential claims of error, including those suggested by defendant. Indeed, the majority below did not disagree with the conclusion reached by Judge Meskill in his dissent that the record indicated that appellate counsel "studied the trial record, considered several potential grounds for appeal, communicated his opinions to his client requesting thoughts and suggestions, and filed a skillfully drafted brief which set forth the factual and legal bases of claims that, in his professional judgment, he considered viable." Pet. App. 22a.[8]

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[7] Defendant erroneously suggests that strategic decisions on appeal should be treated differently from strategic decisions at trial, because in the trial context strategic decisions must be made instantaneously (Resp. Br. 22-23). But in fact trial counsel makes many strategic decisions far in advance of trial, including decisions about which motions to make, which witnesses to call, and what to say in the opening and closing remarks. If the Constitution requires assigned appellate attorneys to raise every nonfrivolous issue at defendant's request, so too it must require assigned trial counsel to abide by the defendant's judgment in strategic decisions. Such an arrangement would be of no benefit to defendants and would have a devastating effect on the administration of the criminal justice system.

[8] Defendant misrepresents the record when he asserts that appellate counsel simply disregarded his suggestions and "urged Barnes to file his own *pro se* briefs" (Resp. Br. at 31). The *pro se* brief mentioned in counsel's November 9th letter was already written, having been fully prepared by defendant before counsel was ever appointed. That brief was filed with the court at defendant's request (J.A. 28).

There is absolutely no evidence that counsel failed to study the trial transcript or to research the applicable law. Counsel simply concluded that the best strategy for seeking reversal was to advance particular strong issues undiluted by numerous frivolous or weak claims.[9]

The record plainly supports the conclusion that the claims of error cited by the court of appeals were omitted for tractical purposes. Each claim is considered briefly below.

A. Defendant's Claim That The Trial Court Improperly Refused To Charge On Accessorial Liability In The Language Requested By Defense Counsel Is Patently Frivolous.

The omission of a claim of error related to the trial court's charge on accessorial liability is an example of an intelligent tactical decision made by defendant's assigned appellate counsel. In his November 9, 1977 letter, appellate counsel indicated that he was considering the claim that the trial court erroneously denied trial counsel's request to charge on accessorial liability (J.A. 28). Appellate counsel later abandoned this claim for good cause; it is frivolous.

Trial counsel requested the following charge:

> The defendant cannot be held criminally responsible for any deed done by other persons if it does not appear, beyond a reasonable doubt, that the general purpose was confronted to [*sic*] by him and was done with his knowledge.

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[9] The primary argument advanced by appellate counsel, that the victim's testimony identifying defendant should have been precluded, was the only claim which, if successful, would have resulted in the dismissal of the indictment rather than a new trial.

(T. 188). That charge is not a correct statement of the law on accessorial liability in New York.[10]

A defendant may be criminally liable for another's actions without knowledge of the person's intent. The prosecution must prove only that the defendant himself had the intent necessary to commit the crime charged. Thus, in the instant case the prosecution was not required to prove that defendant knew the intent of his accomplices or which of them actually took the victim's property. It was sufficient to prove that the defendant intended that the victim be deprived of his property and intentionally aided others in stealing that property. N.Y. Penal Law § 20.00; *People* v. *Ozarowski*, 38 N.Y.2d 481, 491, 344 N.E. 2d 370, 375-76, 381 N.Y.S.2d 438, 444 (1976).[11] The court so instructed the jury.

Moreover, defendant never claimed that he was present at the scene but did not participate or assist others in the commission of the robbery; nor was it ever suggested that the people who robbed and assaulted the victim did not intend to cause him injury or deprive him of his property. N.Y. Penal Law §§ 10.00(9) and 155.05(1). De-

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[10] Contrary to defendant's assertion (Resp. Br. at 41-42), the State does not claim that the trial judge gave a charge that was the equivalent of defense counsel's request. To do so would have been error. The trial court gave its own charge on accessorial liability which was a correct statement of the law.

[11] Contrary to defendant's suggestion in this Court, ample evidence was adduced from which the jury could infer defendant's intent. The victim testified that defendant and an accomplice approached him in the hallway of an apartment building. They positioned themselves behind the victim while the other two assailants stood in front of the exit (T. 26-27). Defendant grabbed the victim and repeatedly struck him in the eye while the accomplices took his property. The physical assault aided in rendering the victim incapable of resisting the theft and the injury to his eye may have helped prevent the apprehension of the accomplices.

fendant testified that he was at home with his father and sleeping girlfriend at the time of the robbery. Both trial and appellate counsel primarily challenged the reliability of the identification.

In light of the correct charge on the law of accessorial liability and in light of defendant's reliance on a defense of alibi, appellate counsel's decision to omit any challenge to the charge on accessorial liability was a reasonable and correct strategic decision.

B. Defendant's Claims of Error Committed by Trial Counsel Are All Beyond The Record or Frivolous.

Appellate counsel's decision to omit a claim that defendant received ineffective assistance from his trial counsel was not, as defendant suggests (Resp. Br. at 39, n. 39), based on an incorrect belief that claims of ineffective assistance of counsel are never cognizable on appeal. Rather, counsel's decision was grounded on the accurate belief that, insofar as the claim relied on extra-record material, it was not cognizable on appeal.

As it appeared in defendant's first *pro se* brief, the claim of ineffective assistance of trial counsel was completely grounded on matters beyond the record (J.A. 14-15, 19-21).[12] Appellate counsel correctly informed defendant that "new facts" which are not contained in the record cannot be advanced on appeal (J.A. 27), and that, in counsel's opinion, the claims contained in defendant's first *pro se* brief lacked support from the record (J.A. 28).

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[12] Defendant argues that his trial counsel failed to investigate the defense. The record contradicts defendant's claim. Counsel obtained the victim's medical records (T. 58), relevant police reports (W. 47, T. 79), and the school records of the victim's friend (T. 92).

In the Second Circuit defendant raised three new claims of ineffective assistance of trial counsel. These claims were likewise frivolous and their omisson by appellate counsel was due not to ignorance or neglect, but to strategy. The record shows sound tactical reasons for the omission of each of these claims.

First, defendant claims that appellate counsel should have argued that trial counsel should have called defendant's father as a witness. A claim that a particular witness should have been called at trial is not a proper basis for arguing on appeal that trial counsel was ineffective, because such a decision is presumptively tactical. *United States v. Yanishefsky*, 500 F.2d 1327, 1331-32 (2d Cir. 1974); *Vess v. Peyton*, 352 F.2d 325 (4th Cir. 1965); *Bolden v. United States*, 266 F.2d 460, 461 (D.C. Cir. 1959). Moreover, that claim depends on facts beyond the record and is therefore not properly raised on direct appeal.

Second, defendant claims appellate counsel should have argued that trial counsel improperly failed to make an offer of proof regarding the relevance of the medical report which indicated that the victim once blacked out on the street. But that claim would have been inconsistent with the claim that the trial court erred in precluding this evidence after a proper offer of proof (J.A. 35-38). Appellate counsel reasonably selected the line of attack that seemed most promising. Moreover, the claim was frivolous because the report indicated that the cause of the blackout may have been a physical blow (T. 58-59), and therefore defense counsel at trial could not prove that the victim suffered from any psychiatric problems.

Third, defendant claims that appellate counsel should have alleged that trial counsel was incompetent because he did not object to the single paragraph of the prose-

cutor's summation which defendant now characterizes as objectionable. But that decision was a rational exercise of professional judgment. The advancement of this claim would have been futile because the prosecutor's statements were fair comments on the evidence. At trial, defendant admitted, under oath, that he lied, stole and cheated on numerous prior occasions (T. 102-14, 122). The prosecutor's comments on this testimony, in relation to defendant's credibility, were proper. Moreover, the prosecutor's comments were directly responsive to the defense summation, in which defense counsel disparaged the victim's verasity and integrity (T. 131), and offered his own opinions that the victim was lying (T. 132), while his client was truthful (T. 136-37).

New York appellate courts recognize that summation is the phase of a trial which is necessarily argumentative and provocative and allow leeway for comments which are responsive to the defense summation. *People v. Galloway*, 54 N.Y.2d 396, 398-99, 430 N.E.2d 885, 886-87, 446 N.Y.S.2d 9, 10 (1981); *People v. Marks*, 6 N.Y. 2d 67, 77, 160 N.E.2d 26, 31, 188 N.Y.S.2d 465, 473 (1959); *People v. Davilla*, 59 A.D.2d 536, 537, 397 N.Y.S.2d 123, 124 (2d Dept. 1977). A decision as to whether to object to a particular question or comment by the prosecutor is the classic example of a tactical decision which must be entrusted to trial counsel. *Henry v. Mississippi*, 379 U.S. 443 (1965). Reviewing courts are properly reluctant to disturb such decisions. *United States v. Helgesen*, 669 F.2d 69, 72 (2d Cir.), *cert. denied*, 102 S.Ct. 1978 (1982); *Peterson v. Kennedy*, 532 F. Supp. 113, 116 (N.D.N.Y. 1982).

In sum, it is properly within the province of assigned or retained attorneys to make strategic judgments on behalf of their clients and that is exactly the action taken by defendant's appellate counsel in this case.

CONCLUSION

The Judgment Of The Court Of Appeals Should Be Reversed.

Respectfully submitted,

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IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1982

No. 81-1794

EVERETT W. JONES, ET AL. - - *Petitioners*

v.

UNITED STATES OF AMERICA EX REL.
DAVID BARNES - - - - - *Respondent*

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

BRIEF OF THE NATIONAL LEGAL AID AND DEFENDER ASSOCIATION AS AMICUS CURIAE

INTEREST OF AMICUS

The National Legal Aid and Defender Association (NLADA) is a not-for-profit organization whose primary purpose is to assist in providing effective legal services to persons unable to retain counsel. Its members include the great majority of public defender offices, coordinated assigned counsel systems, and legal services agencies in the United States. NLADA also includes two thousand individual members, most of whom are private practitioners.

NLADA joins respondent in seeking affirmance of the judgment of the United States Court of Appeals

for the Second Circuit. This case presents an issue regarding the extent of an appointed appellate counsel's ethical and constitutional duty to raise and argue on appeal particular issues at the defendant's request.

No other national organization represents appellate public defenders as extensively as NLADA. No other national organization has the field experience in the examination and evaluation of appellate public defender programs which NLADA has.

NLADA also has an interest in protecting the rights of indigent clients and in insuring that they are not denied rights on the basis of their wealth. This brief is submitted on the clients' behalf as well.

NLADA has received the written consent of both parties for the filing of this brief.

ARGUMENT

The Sixth and Fourteenth Amendments Do Require Assigned Appellate Defense Counsel to Raise Every Nonfrivolous Issue Requested By Defendant On Appeal From a Criminal Conviction.

In the decision below, the Second Circuit Court of Appeals held that "when . . . [an] appellant's appointed counsel intends to argue particular colorable points [on appeal], but the appellant requests that [the attorney] raise additional colorable points, counsel must argue the additional points to the full extent of his professional ability." *Barnes* v. *Jones*, 665 F. 2d 427, 433 (2d Cir. 1981). In *Barnes*, the court held that since "at least two issues were colorable and should have been argued by counsel to [the appellate court],

and counsel on appeal, . . . fail[ed] to do so, [he] must be held to have rendered ineffective assistance [on appeal.]" *Id.* at 435.

According to the *Barnes* decision, "[a]ppellate counsel need not argue frivolous appeals or raise frivolous issues on appeal, even if his client so requests." *Id.* at 433. For example, "[i]f upon conscientious examination, counsel finds defendant's case to be wholly frivolous, he may so advise the court and request permission to withdraw." *Id.* "Similarly, where defendant's appeal raises both frivolous and colorable (i.e., nonfrivolous) issues, the case law permits counsel to argue only the colorable points and to omit the frivolous arguments that appellant would have him raise." *Id.* "Alternatively, . . . appellate counsel may include the frivolous questions in his brief but deal with it sketchily, neither developing it in detail nor pressing it on the court." *Id.*

The court below emphasized that "[a]ppointed counsel's judgment that appellant is unlikely to prevail on the merits of his nonfrivolous arguments is no substitute for an active advocate's presentation of those arguments to the appellate court, which is the appropriate forum for making a decision on the merits." *Id.* "[A]ppointed counsel's unwillingness to present particular arguments at appellant's request functions not only to abridge defendant's right to counsel on appeal, but also to limit the defendant's constitutional right of equal access to the appellate process in order to redress asserted errors at trial—the very right

that an appointment of appellate counsel was designed to preserve." *Barnes* v. *Jones, supra* at 433-434.

The *Barnes* court emphasizes that nothing in the opinion "detracts from the proposition" that "appellate counsel has the authority to make decisions regarding strategies and tactics attendant to his representation, and authority flowing from recognition of counsel's professional training, experience, and well-informed judgment." *Id.* at 435. "But the decision to forego potentially meritorious issues on appeal requires as much client input as does the decision whether to appeal in the first instance." *Id.*

The principle espoused by the Second Circuit that a court-appointed appellate counsel must constitutionally raise every nonfrivolous issue requested by the defendant on appeal in a criminal case is predicated on and validated by accepted ethical and constitutional precepts.

"Certain decisions relating to the conduct of the case are ultimately for the accused and others are ultimately for defense counsel." I ABA Standards for Criminal Justice (2nd Ed. 1980), The Defense Function, § 4-5.2(a). "As established by the history of the criminal justice process and the rights vested in an accused under the Constitution, certain basic decisions have come to belong to the client while others fall within the province of the lawyer." ABA Standards, The Defense Function, *supra,* Commentary, § 4-5.2. In fact, "[t]he language and spirit of the Sixth Amendment contemplate that counsel, like the other defense tools guaranteed by the Amendment, shall be an aid to

a willing defendant—not an organ of the state interposed between an unwilling defendant and his right to defend himself personally." *Faretta* v. *California*, 422 U. S. 806, 820 (1975).

"Appellate counsel should give a client his or her best professional evaluation of the questions that might be presented on appeal." IV ABA Standards for Criminal Justice (2nd Ed. 1980), Criminal Appeals, § 21-3.2(b)(i). "Counsel, when inquiring into the case, should consider all issues that might affect the validity of the judgment of conviction and sentence." *Id.* "Counsel should advise on the probable outcome of a challenge to the conviction or sentence." *Id.* "Counsel should endeavor to persuade the client to abandon a wholly frivolous appeal or to eliminate contentions lacking in substance." *Id.*

"Another dimension to this question [of the function of counsel for a defendant-appellant] arises when, in the estimate of counsel, the decision of the client to take an appeal, or the client's decision to press a particular contention on appeal, is incorrect." IV ABA Standards, Criminal Appeals, *supra,* Commentary, § 21-3.2. "Counsel has the professional duty to give to the client fully and forcefully an opinion concerning the case and its probable outcome." *Id.* "Counsel's role, however, is to advise." *Id.* "The decision is made by the client." *Id.* "On the other hand, 'a lawyer is not justified in asserting a position in litigation that is frivolous.' " *Id.,* citing EC 7-4.

Clearly, "[w]hen a client seeks to prosecute an appeal against the advice of counsel that there is no

hope for success, counsel cannot deceive or mislead the court on behalf of the client." *Id.* "If the ground upon which the client seeks relief lacks any legal support or is contravened by existing law, counsel may nonetheless argue for extension, modification, or reversal of existing law." *Id.*, citing DR 7-102(A)(2).

It would appear from the ABA Standards on Criminal Appeals that appellate counsel in a criminal case does not decide which colorable or nonfrivolous issues to raise on appeal, but only advises the defendant-appellant on the "probable outcome" of litigating particular appellate issues.

Obviously, a colorable or nonfrivolous assignment of error, by the attorney's own decision, has the potential to generate some relief for the defendant-appellant. Appellate relief is the "lawful objective" of the defendant-appellant and assignments of error in an appellate brief are the "available means permitted by law" for securing that relief.

"A lawyer *shall not intentionally* fail to seek the lawful objectives of his client through reasonably available means permitted by law and the Disciplinary Rules, except as provided by DR 7-101(B)." *American Bar Association Code of Professional Responsibility* DR 7-101(A)(1); (emphasis added.). "In his representation of a client, a lawyer may, where permissible, exercise his professional judgment to waive or fail to assert a right or position of his client." DR 7-101(B)(1).

"DR 7-101(B)(1) is a troublesome provision. It provides that in the exercise of professional judgment,

a lawyer, 'where permissible,' may waive or fail to assert a client's right or position. The boundaries of what is 'permissible' are not clarified. If interpreted to refer solely to technical decisions of strategy or tactics which require trained professional judgment and skill, this provision conforms with judicial opinion." American Bar Foundation, *Annotated Code of Professional Responsibility* (1979) DR 7-101(B) Comment. "Conversely, the client is traditionally granted decision-making authority in matters that more obviously affect the outcome of the case." *Id.*

"In certain areas of legal representation not affecting the merits of the cause or substantially prejudicing the rights of a client, a lawyer is entitled to make decisions on his own." EC 7-7. "But otherwise the authority to make decisions is exclusively that of the client and, if made within the framework of the law, such decisions are binding on his lawyer." EC 7-7.

"In EC 7-7 the distinction is only an aspirational one, but it is arguable that the reference to decisions by the attorneys in areas 'not affecting the merits of the cause or substantially prejudicing the rights of a client' is intended to clarify the 'permissible' areas of the attorney's authority which are mentioned in DR 7-101 (B)(1)." DR 7-101(B) Comment.

This Court has fused these ethical precepts into the federal constitutional obligations of a criminal defense counsel. "[A] defense attorney has a duty to advance *all colorable claims* and *defenses*." *Polk County* v. *Dodson*, —— U. S. ——, 102 S. Ct. 445, 452 (1981); (emphasis added.) Indeed, the presence of an appel-

late defense counsel insures that "a *defendant's claims of error* are organized and presented in a lawyerlike fashion" to the appellate court. *Ross* v. *Moffitt*, 417 U. S. 600, 615 (1974); (emphasis added.) Nevertheless, "the canons of professional ethics impose limits on permissible advocacy." *Polk County* v. *Dodson*, *supra*, 102 S. Ct. at 452. "It is the obligation of any lawyer—whether privately retained or publicly appointed—not to clog the courts with frivolous motions or appeals." *Id*

"There is no requirement that an attorney appeal issues that are clearly untenable." *Gustave* v. *United States*, 627 F. 2d 901, 906 (9th Cir. 1980). "Counsel need not appeal every possible question of law at the risk of being found to be ineffective." *Id.* at 906.

Conversely, "a substantial matter of arguable merit is not to be abandoned [by appellate defense counsel] on the ground that it might de-emphasize another issue." *Commonwealth* v. *Townsell*, Pa., 379 A. 2d 98, 101 (1977). "It may well be that the press of time at oral argument may curtail the presentation of some points but, at the least, appellate counsel should brief each significant arguable issue." *Id.* "Strategy of defense counsel may warrant deliberate choice as to the manner, emphasis, and length of argument but complete disregard of an important issue cannot be ignored as a matter of strategy." *Commonwealth* v. *Townsell*, *supra* at 101.

According to a number of commentators, "[o]ne of the primary difficulties experienced by appellate counsel is the hesitance to limit the number of issues pre-

sented" in a brief. Purver & Taylor, *Handling Criminal Appeals* (1980), § 91, p. 142. Some appellate practitioners believe that "[e]ffective advocacy requires the recognition that if there are one or two strong arguments for reversal, these should be presented forcefully and others of less merit eliminated." *Id.* To those appellate attorneys, "[a]ttempting to deal with too many issues . . . results in a dilution of the effectiveness of the key arguments." *Id.* These advocates have tactically concluded that, in their professional judgment, "the overpresentation of issues" dilutes and seriously weakens the major arguments advanced on appeal.

The mere fact that a decision in a criminal trial or appeal has tactical or strategic implications which require the professional assessment of a trained advocate does not establish whether the ultimate decision on the matter ethically or constitutionally belongs to the attorney or the client.

For example, "[w]ith respect to the decision whether the defendant should testify, the lawyer 'should give his client the benefit of his advice and experience, but the ultimate decision must be made by the defendant, and the defendant alone.'" I ABA Standards, The Defense Function, *supra*, § 4-5.2, Commentary.

Certainly the appellate practitioner has the right, perhaps even the duty, to advise his client that in his considered professional judgment only the three major issues should be raised in the brief and the two other remaining issues should be abandoned to avoid diffus-

ing the stronger arguments. But the client, who potentially may benefit from each or any of the five issues, may rather opt for more chances for relief at the expense of diluting the more promising assignments of error.

Although courts often impose page limits on appellate briefs, the procedural restriction should not be construed as implicit judicial recognition that appellate counsel may ethically and constitutionally abandon or waive colorable claims on appeal to satisfy administrative guidelines constructed to facilitate the appellate judicial function. It is well recognized that "[r]ules on briefs *should* give the parties *adequate* opportunity to present argument in written form." ABA Standards of Judicial Administration (Approved Draft 1977), Appellate Courts, § 3.31, p. 47; (emphasis added.)

"In America appellate courts briefs are the primary vehicle for communicating the parties' contentions to the court." ABA Standards, Appellate Courts, *supra*, § 3.31, Commentary. "Good briefing practice can fully achieve the purpose of acquainting the court quickly and completely with the issues it must decide." *Id.* "Rules on format and arrangement of briefs should be carefully evaluated to see that they promote this objective." *Id.* "They should specify page limitations, with provisions allowing briefs [in excess of the limitation] on application for good cause." *Id.* For example, in the federal appellate courts the appellant's initial brief may not exceed fifty pages "[e]xcept by permission of the court." Fed. R. App. P. 28(g).

"Appellate courts do not always demand of the adversary system the assistance it is capable of providing." ABA Standards, Appellate Courts, *supra*, § 3.33, Commentary. "The [appellate] court should request supplemental briefs by the parties if the original briefs or oral argument leaves the court inadequately informed of the facts, issues, or relevant authorities in the case, or the court for other reasons believes that supplemental briefing may aid it in reaching a proper decision." ABA Standards, Appellate Courts, *supra*, § 3.33. "Counsel may properly be expected to submit briefs *that clearly and completely state the relevant issues*, authorities, and decisional considerations." *Id.*, § 3.33, Commentary (emphasis added.)

In the extraordinary situation where the sheer magnitude of colorable, nonfrivolous issues in a case would necessitate the tendering of a brief in excess of the procedural page limitation, the appellate court involved would no doubt grant the appellant permission to file the nonconforming brief. The vagaries of procedural rules governing appellate practice in different jurisdictions are not suitable touchstones for determining the constitutional and ethical responsibilities of assigned appellate counsel.

Clearly, the scope of an appeal is a decision for the client. Appellate counsel may *not* narrow the scope of the appeal without the appellant's authorization. *State* v. *Pence*, Hawaii, 488 P. 2d 1177, 1179 (1971).

Often, the various colorable issues in a case involve different phases of the trial, implicate different federal

constitutional rights, and demand extremely different modes of relief. For example, in a jurisdiction where the jury performs a sentencing function, an appellant who has received the minimum authorized sentence at his first trial is exposed to the possibility of receiving a larger sentence on retrial following a successful appeal. *Chaffin* v. *Stynchcombe,* 412 U. S. 17 (1973). Consequently, issues which have as the appropriate appellate relief a retrial with its concomitant possibility of an increased sentence present difficult choices for the appellant. On the other side of the ledger, an issue such as the denial of the federal constitutional right to a speedy trial has dismissal of the indictment as "the only possible remedy." *Strunk* v. *United States,* 412 U. S. 434, 439-440 (1973). Obviously, by asserting on appeal a denial of his right to a speedy trial, an appellant does not in any way expose himself to the risk of any additional punishment or prosecution should his allegation of error be ruled meritorious and appellate relief granted.

It seems incomprehensible that an appointed appellate defense attorney, under the justification of tactical and strategic control of the appeal, could unilaterally decide to abandon the client's colorable speedy trial issue to avoid detracting from the strength of his other colorable evidentiary issue which could, if successful, entitle the client to a new trial and the possibility of a more severe sentence than the one initially imposed by the jury.

On appeal, the issues often present such varied types of relief and such radically different exposure

for the client that it would be clearly insensitive to the realities of the appellate forum to suggest that the client, by electing to appeal the case, forfeits to his counsel the right to structure his options on appeal by pursuing or waiving colorable, nonfrivolous issues present in his appellate record.

"The appellate court lawyer [must] be a pleader for and upholder of his client's interest." F. Hamley, Appellate Advocacy, 12 *Ark. L. Rev.* 129, 131 (1958). "He must be a partisan for the cause he espouses." *Id.*

In reality, seasoned appellate practitioners hold and espouse a multitude of diverse theories on the art and practice of briefing an appeal. None of those tactics and strategies may be categorized as the correct way to decide the issues to raise on appeal. The advocacy task of the appellate practitioner is an art, not a science. As a result, the appellate practitioner's conviction that his theories on issue selection and representation are tried and true provide little support for the principle that the attorney, rather than the client, possesses the power and the authority to omit mutually acknowledged colorable issues from the brief and to deny the client those potential avenues of relief from his conviction and/or sentence.

"[T]he determination of which points should not be argued is frequently very difficult." *Stern, Appellate Practice in the United States* (1981), pp. 282-283. "Most lawyers can cite examples where judges surprised them and decided cases on grounds which the lawyer thought to be much weaker than others." *Id.* at 283. "Indeed, supreme courts have sometimes de-

cided cases on a ground which the lawyer did not mention in his brief at all, either because it did not occur to him or because he deemed it too weak to raise." *Id.*

The various arguments advanced to establish that the appellate practitioner is uniquely qualified and suited to determine which nonfrivolous issues to litigate and which to abandon simply demonstrate the need for the appellate lawyer to utilize his talent and training to advise the client of the possible pitfalls and advantages of asserting certain issues and omitting others.

Ultimately, it would appear that an appellate defense attorney, whether retained or appointed, need not discuss with his client the issues he intends to raise on appeal except in certain particular situations. Whenever the appellate defense attorney makes the professional judgment that there are certain colorable or nonfrivolous errors to raise on appeal and he intends to raise all of them, he need not discuss his decision with the client. Similarly, when the appellate defense attorney intends to raise all of the colorable or nonfrivolous issues he has identified but will not raise any of the remaining allegations of error because he has professionally determined them to be frivolous, he does not have to confer with this client concerning these decisions. Finally, when the appellate defense attorney has identified a number of colorable or nonfrivolous issues and intends to raise some but not all of those issues, he must either obtain the client's permission to omit certain colorable issues or he must change his strategic decision and, without consulting

his client, raise all of the issues which he has identified as colorable or nonfrivolous.

An appellate attorney, regardless as his status as appointed or retained, owes the obligation to his client to raise any and all grounds for appellate relief that he, in his professional judgment, believes could warrant partial or complete relief for the client, whether on the merits of the conviction or on the sentence. The decision to abandon an assignment of error, which in the attorney's own professional opinion, could potentially generate relief, may only be made by the client—the person who stands to suffer the loss of the opportunity to obtain that relief.

This Court should endorse the holding of the Second Circuit Court of Appeals and enunciate a principle of ethics and federal constitutional law which requires that whenever an appellate defense attorney desires, for whatever strategic reasons, to omit a colorable or nonfrivolous issue, he must have the express consent of his client before he omits the allegation of error from the appellant's brief.

CONCLUSION

For the reasons stated above, the National Legal Aid and Defender Association, as amicus curiae, urges this Court to affirm the decision of the Second Circuit Court of Appeals.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1982

EVERETT W. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL., PETITIONERS

v.

DAVID BARNES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

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QUESTION PRESENTED

Whether respondent's rights under the Due Process or Equal Protection Clause of the Fourteenth Amendment were violated when court-appointed counsel representing him on appeal from his state criminal conviction did not present every non-frivolous argument that respondent assertedly requested him to raise.

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In the Supreme Court of the United States

OCTOBER TERM, 1982

81-1794

EVERETT W. JONES, SUPERINTENDENT, GREAT MEADOW CORRECTIONAL FACILITY, ET AL., PETITIONERS

v.

DAVID BARNES

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF PETITIONERS

INTEREST OF THE UNITED STATES

This case presents an important question concerning the constitutional obligation of court-appointed appellate counsel to present every non-frivolous argument that the defendant has requested him to raise. Although this is a state case, the Court's decision would govern federal criminal cases as well.

INTRODUCTION AND SUMMARY OF ARGUMENT

The court of appeals directed the district court to grant respondent habeas corpus relief unless the State affords him the opportunity to take a fresh appeal represented by new counsel. Yet the majority below did not disagree with Judge Meskill's conclusion in dissent that "appellate counsel, Michael Melinger, studied the trial record, considered several potential grounds for appeal, communicated his opinions to the client requesting thoughts and suggestions, and filed a skillfully drafted brief which set forth the factual and legal bases of the claims that, in his professional judgment, he considered viable" (Pet. App. 22a).

The court of appeals' decision instead rested solely on the fact that appellate counsel did not include in his brief two other claims that the court found to be non-frivolous or "colorable." The court did not hold that Melinger's omission of these claims so departed from what any reasonably competent appellate attorney would have done as to render his assistance ineffective. Rather than comparing Melinger's professional judgment to that of other *attorneys* in this fashion, the court concluded that Melinger's judgment should be measured against that of respondent, a layman. The court believed that respondent had insisted that Melinger raise the two arguments it found to be "colorable," and it announced a per se rule requiring appointed counsel representing an indigent person on appeal of his criminal conviction to argue *every* issue that the appellant requests him to raise, notwithstanding counsel's considered judgment to the contrary, unless the particular issue is wholly frivolous.

This unprecedented per se rule is inconsistent with the accepted allocation of decision-making responsibility between counsel and the defendant in criminal cases, both at trial and on appeal. Under those principles, certain fundamental decisions—whether the defendant will plead guilty, waive a jury trial, or testify at trial, and whether, if convicted, to appeal—are reserved to the defendant. But all other matters of strategy, including the selection of legal arguments to raise, traditionally may be reserved to the attorney.

The Second Circuit's rule actually disserves the goals of this Court's decisions in *Douglas* v. *California*, 372 U.S. 353 (1963), and *Anders* v. *California*, 386 U.S. 738 (1967), which require the appointment of counsel to act as a forceful and effective advocate for an indigent appellant. *Anders* is concerned only with the situation in which appointed counsel seeks to withdraw, thereby depriving the indigent appellant of all assistance of counsel. That case did not address the quite different issue of how an attorney who remains in a case that is not entirely

frivolous should frame the appeal. That issue should be considered under the standards that guide an attorney's advocacy generally.

Experience teaches that the most effective appellate advocate frequently will find it necessary to narrow the range of issues to be presented for review. The Second Circuit's per se rule, in contrast, risks diverting the attention and resources of counsel and the court from issues that present the most realistic possibility of obtaining a reversal of the indigent appellant's conviction. Thus, by insisting that an indigent appellant be permitted to override his appointed counsel's considered professional judgment regarding the most effective way to argue the appeal, the Second Circuit has held, in substance, that an indigent appellant has a constitutional right to *ineffective* assistance of counsel. The court of appeals has offered no satisfactory support in logic or precedent for such a perverse rule, which disserves the interests of indigent appellants as a class, and we can think of none.

Where, as here, appellate counsel has complied with the requirements of *Anders* by filing an advocate's brief, the adequacy of that brief should be considered under whatever standards of effective representation, if any, the Constitution may impose on appellate counsel.

ARGUMENT

THE CONSTITUTION DOES NOT REQUIRE APPOINTED COUNSEL REPRESENTING AN INDIGENT APPELLANT TO RAISE EVERY NON-FRIVOLOUS ISSUE REQUESTED BY THE APPELLANT

A. There Are Substantial Difficulties In Identifying A Satisfactory Constitutional Basis For Granting Collateral Relief On Account Of Inadequacy Of Appellate Counsel's Performance

It should be recognized at the outset that there are significant conceptual and legal difficulties in identifying a firm constitutional foundation upon which to evaluate the performance of court-appointed appellate counsel. In

granting respondent relief, the court of appeals relied principally upon what it identified (Pet. App. 11a) as an "extension" of this Court's decision in *Anders* v. *California*. That decision, in turn, was based on *Griffin* v. *Illinois*, 351 U.S. 12 (1956), and *Douglas* v. *California*, 372 U.S. 353 (1963), which relied generally on principles of fair process and equal justice drawn from the Due Process and Equal Protection Clauses of the Fourteenth Amendment in announcing certain rights of indigent persons on appeal. But as this Court since has recognized (see *Ross* v. *Moffitt*, 417 U.S. 600, 608-609 (1974)), neither Clause provides an entirely satisfactory basis for the holding in *Douglas* that a State must furnish counsel to an indigent on appeal of his felony conviction. Similarly here, neither Clause of the Fifth Amendment, nor the counsel right of the Sixth Amendment, provides an entirely satisfactory basis for evaluating the *performance* of counsel on appeal.

1. a. A due process analysis "emphasizes fairness between the State and the individual dealing with the State, regardless of how other individuals in the same situation may be treated." *Ross*, *supra*, 417 U.S. at 609. Because this Court has never held that the Due Process Clause even requires the State to furnish a right of appeal from a criminal conviction in the first place,[1] it is not immediately evident how the assistance of counsel becomes an essential element of fair process whenever the State does elect to provide a right of appeal. *Id.* at 610-611. It is even more difficult to understand how due process requires that an appellant be afforded an opportunity for a new appeal because his attorney—in the exercise of what is "essentially a private function" (*Polk County* v. *Dodson*, No. 80-824 (Dec. 14, 1981), slip op. 6)—failed to make a particular argument.[2] Indeed, in light of a number of

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[1] See, *e.g.*, *Abney* v. *United States*, 431 U.S. 651, 656 (1977); *Blackledge* v. *Perry*, 417 U.S. 21, 25 n.4 (1974); *Chaffin* v. *Stynchcombe*, 412 U.S. 17, 24 n.11 (1973); *North Carolina* v. *Pearce*, 395 U.S. 711, 724-725 (1969); *Rinaldi* v. *Yeager*, 384 U.S. 305, 310 (1966); *McKane* v. *Durston*, 153 U.S. 684 (1894).

[2] This case therefore does not resemble *Wood* v. *Georgia*, 450 U.S. 261 (1981), where the Due Process Clause did require the State

this Court's decisions last Term, there is a substantial question whether such conduct of appellate counsel, whose independence the State is constitutionally obligated to respect (*id.* at 8-9), can in any way be considered "state action" for purposes of the Due Process Clause of the Fourteenth Amendment[3]—at least where the state appellate court, in affirming the conviction, did not know or have reason to know of counsel's allegedly inadequate performance. Compare *High* v. *Rhay*, 519 F.2d 109, 113 (9th Cir. 1975), discussed at notes 15 and 20, *infra*.[4]

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to afford the opportunity for the proceeding at which retained counsel allegedly performed in an ineffective manner that the Court believed might have resulted in a due process violation.

[3] There is, for example, little the State could do while an appeal is pending to enforce the Second Circuit's per se rule requiring appointed counsel to obey his client's wishes regarding the issues to be raised on appeal, without impermissibly intruding into the confidentiality of the attorney-client relationship. Therefore, if habeas corpus relief is granted because of appellate counsel's failure to heed his client's request, the result would be to "impos[e] on the State, its agencies or officials, responsibility for conduct for which they cannot fairly be blamed." *Lugar* v. *Edmondson Oil Co.*, No. 80-1730 (June 25, 1982), slip op. 14.

[4] The Court held in *Polk County* that a deputy public defender employed by a county did not act "under color of state law" for purposes of 42 U.S.C. 1983 when she followed a state procedure patterned after *Anders* in seeking to withdraw as counsel on appeal (slip op. 1-2). In subsequent cases the Court indicated that counsel's conduct in *Polk County* was not state action either. *Rendell-Baker* v. *Kohn*, No. 80-2102 (June 25, 1982), slip op. 11; *Lugar* v. *Edmonson Oil Co.*, No. 80-1730 (June 25, 1982), slip op. 13-14 n.18; *id.* at 8-9 (Powell, J., dissenting); *Blum* v. *Yaretsky*, No. 80-1952 (June 25, 1982), slip op. 13, 16-17 & n.20. Similarly, in *Wainwright* v. *Torna*, No. 81-362 (Mar. 22, 1982) (per curiam), slip op. 3 n.4, the Court rejected the contention that retained counsel's failure to file a timely petition for discretionary review of a conviction in the Florida Supreme Court deprived the respondent of due process, observing that any such deprivation "was caused by his counsel, and not by the State."

We recognize that in *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-345 (1980), the Court rejected the contention that failings of retained

b. There are comparable conceptual difficulties in evaluating the performance of appointed counsel under the equal protection principles invoked in *Douglas* and *Anders*. An equal protection analysis "emphasizes disparity in treatment by a State between classes of individuals whose situations are arguably indistinguishable." *Ross*, *supra*, 417 U.S. at 609. Unless the Constitution requires a certain level of competence of *retained* counsel on appeal—and the Court has not so held (compare *Cuyler* v. *Sullivan*, 446 U.S. 335, 342-345 (1980))—there is some doubt that the State may be said to have deprived an indigent appellant of the equal protection of the laws if appointed counsel does not satisfy a particular standard of performance. Moreover, if a particular court-appointed attorney handles a case in an ineffective manner, that performance cannot necessarily be attributed to the appellant's indigency, rather than to variation in the training, experience, dedication, or care among attorneys generally, which non-indigent appellants experience as well. It would not appear, in other words, that the State has treated indigents differently as a class (see *Ross*, *supra*, 417 U.S. at 609) simply because the attorney appointed to represent an indigent defendant in a particular case performed in a substandard manner.

c. The holding in *Douglas* v. *California* that a State must furnish counsel to an indigent appellant did not rest upon the Sixth Amendment right to counsel, which was made applicable to the States in *Gideon* v. *Wainwright*, 372 U.S. 335 (1963), decided the same day. See *Ross*, *supra*, 417 U.S. at 610. Indeed, there is substantial reason

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counsel at trial due to a conflict of interest do not constitute state action. However, the present case, like *Polk County*, may be distinguished from *Cuyler* v. *Sullivan* on the ground that it involves the performance of counsel on appeal, to which the Sixth Amendment would seem to be inapplicable. See pages 7-8, *infra*. An indigent person's appeal of his conviction, unlike a criminal trial, is not "a proceeding initiated and conducted by the State itself" (*Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 343). See *Ross*, *supra*, 417 U.S. at 610-611.

to doubt that the Sixth Amendment applies of its own force at the appellate stage. That Amendment speaks of the rights of the "accused" in "criminal prosecutions," terms that connote a trial setting. And the other rights conferred upon the accused by the Amendment clearly are trial rights: the right to a "speedy and public trial" and an "impartial jury," to be "informed of the nature and cause of the accusation," "to be confronted with the witnesses against him," and "to have compulsory process for obtaining witnesses in his favor." So, too, the right of the accused to the assistance of counsel is "for his *defence*" (emphasis added), a phrase that likewise connotes a right at the trial stage of the proceedings, where the government bears the burden of prosecuting the case against him. Thus, as this Court has stated, the Sixth Amendment "constitutionalizes the right in an adversary criminal *trial* to make a defense as we know it." *Faretta* v. *California*, 422 U.S. 806, 818 (1975) (emphasis added).

In contrast, an appeal is taken at the conclusion of the "criminal prosecution," after a judgment has been entered. Cf. *Morrissey* v. *Brewer*, 408 U.S. 471, 480 (1972). At that point the subject of the proceedings stands convicted, not merely "accused." It is he, not the State, who then initiates and "prosecutes" the independent appellate proceeding to overturn the presumptively valid judgment of conviction. *Ross*, *supra*, 417 U.S. at 610-611; compare *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 342-345. Accordingly, there is substantial reason to doubt that the Sixth Amendment right to counsel applies on appeal.[8] If

[8] The Sixth Amendment right to counsel has, of course, been extended to settings other than the actual trial itself. In those cases, however, the right has been recognized either in related judicial proceedings in the trial court (see, *e.g.*, *Coleman* v. *Alabama*, 399 U.S. 1, 7-10 (1970); *id.* at 11-12 (Black, J., concurring); *Mempa* v. *Rhay*, 389 U.S. 128 (1967); *cf. Hamilton* v. *Alabama*, 368 U.S. 52 (1961)) or in other circumstances in which the accused confronts the prosecutor or other agents of the State in circumstances that could substantially prejudice his right to a fair trial and undermine the effectiveness of counsel's assistance at trial (*United States* v. *Wade*, 388 U.S. 218, 223-227 (1967); *Massiah* v. *United States*,

the Sixth Amendment did apply in that setting, there would have been no reason to rely in *Douglas* v. *California* on principles of fair process and equal justice, rather than the explicit Sixth Amendment right made applicable to the States that day in *Gideon*.

d. There is no necessity here to resolve these perplexing questions. Whatever may be the appropriate framework within which to evaluate the performance of appointed counsel on appeal, it is clear that the court of appeals erred in announcing a per se rule requiring coun-

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377 U.S. 201, 204 (1964); *United States* v. *Henry*, 447 U.S. 264 (1980); *Moore* v. *Illinois*, 434 U.S. 220 (1977)). See *Schneckloth* v. *Bustamonte*, 412 U.S. 218, 239 (1973); *United States* v. *Ash*, 413 U.S. 300, 310-311 (1973). The rationale of these cases would not support extension of the Sixth Amendment to appeals.

In its per curiam opinion in *Johnson* v. *United States*, 352 U.S. 565, 566 (1957), decided prior to *Douglas* v. *California*, the Court stated that *Johnson* v. *Zerbst*, 304 U.S. 458 (1938), affords the right to assistance of counsel to an indigent defendant who challenges the district court's certification under 28 U.S.C. 1915 that an appeal is not taken in good faith. This citation could be read to reflect the view that the Sixth Amendment guaranteed the right to counsel, although in *Johnson* itself the challenge to the certification was actually not part of the appeal. *Coppedge* v. *United States*, 369 U.S. 438, 445 n.10 (1962); but cf. *Hardy* v. *United States*, 375 U.S. 277, 278 (1964). Subsequently, however, the Court apparently has viewed the counsel right of an indigent federal appellant to derive from the holding in *Douglas* v. *California*. See *Dennett* v. *Hogan*, 414 U.S. 12 (1973). See also Note of the Advisory Committee to the 1966 Amendment to Fed. R. Crim. P. 44 (which made explicit the entitlement of a defendant to counsel on appeal), citing *Douglas*. But see *Mylar* v. *State of Alabama*, 671 F.2d 1299, 1300 (11th Cir. 1982).

Contrary to the Second Circuit's apparent belief (Pet. App. 13a), this Court's decisions in *Rodriguez* v. *United States*, 395 U.S. 327 (1969), and *Entsminger* v. *Iowa*, 386 U.S. 748 (1967), did not rest on the Sixth Amendment, which was not cited in either opinion. The former case was disposed of on the basis of the trial court's failure to advise the defendant of his right to the assistance of counsel on appeal, as required by Fed. R. Crim. P. 37 (see 395 U.S. at 331-332), and the opinion in the latter case expressly relied upon *Douglas* (see 386 U.S. at 751).

sel to argue every non-frivolous issue requested by his client.

B. There Was No Violation Of The Principles Of *Anders* v. *California* In This Case

The court of appeals, in finding appellate counsel's representation of respondent to have been constitutionally flawed, relied upon what it acknowledged (Pet. App. 11a) to be an "extension" of this Court's decision in *Anders* v. *California*, 386 U.S. 738 (1967). That decision, however, lends no support to the court of appeals' holding.

In a series of cases beginning with *Griffin* v. *Illinois*, 351 U.S. 12 (1956), the Court has held that a State that provides an appeal as of right may not make that appeal available in a way that invidiously discriminates against indigent persons. In *Griffin*, for example, the Court held unconstitutional an Illinois statute under which a defendant who was unable to pay the cost of securing a trial transcript was precluded from obtaining appellate review of asserted trial errors. In *Douglas* v. *California*, *supra*, the Court held that a State also must provide counsel for an indigent appellant on his first appeal as of right. The Court reasoned that where counsel is not made available to the indigent appellant, "[t]here is lacking that equality demanded by the Fourteenth Amendment where the rich man, who appeals as of right, enjoys the benefit of counsel's examination into the record, research of the law, and marshalling of arguments on his behalf, while the indigent * * * is forced to shift for himself." 372 U.S. at 357-358.

In *Anders*, the Court held that the constitutional requirement of substantial equality and fair process can be achieved only if the attorney appointed to represent the indigent appellant performs his duties in the traditional role of an active advocate in behalf of his client, as opposed to that of amicus curiae (386 U.S. at 744). In *Anders*, court-appointed appellate counsel, after studying the record and consulting with the defendant, informed the court that there was " 'no merit to the appeal' " and

that he therefore did not intend to file a brief (*id.* at 742). The appellant requested the court to appoint another attorney to represent him. This request was denied, and the state appellate court affirmed the conviction after receiving the appellant's pro se briefs (*id.* at 739-740).

This Court found this procedure inadequate, holding that appointed counsel must "support his client's appeal to the best of his ability" as an advocate, unless he "finds his case to be wholly frivolous" (386 U.S. at 744). In the latter event, he may ask to withdraw, accompanying his request with a brief referring to anything in the record "that might arguably support the appeal" (*ibid.*). The court then must determine "whether the case is wholly frivolous" after permitting the appellant himself to raise additional points. If the court finds the appeal to be frivolous in its entirety, it may grant the motion to withdraw. But "if it finds any of the legal points arguable on their merits (and therefore not frivolous) it must, prior to decision, afford the indigent the assistance of counsel to argue the appeal" (*ibid.*).

The affirmance of respondent's conviction on the appeal presented by Melinger fully complied with the requirements of *Douglas* and *Anders*. Consistent with the former case, Melinger was appointed to represent respondent on his first appeal as of right. And, unlike in *Anders*, counsel did not act in the role of an amicus curiae, merely advising the court in a conclusory fashion that there was no merit to the appeal and then seeking to withdraw. To the contrary, Melinger remained in the case, reviewed the record, considered the merits, consulted with respondent, and "forcefully presented claims of error through citation to pertinent portions of the record and to applicable precedent" (Pet. App. 24a; Meskill, J., dissenting). The decisions in *Douglas* and *Anders* were intended to place the indigent appellant on an equal footing—"as nearly as is practicable" (386 U.S. at 745)—with a non-indigent appellant represented by retained counsel. Here, like that non-indigent appellant, respondent "enjoy[ed] the benefit of counsel's examination into the record, research of the

law, and marshalling of arguments on his behalf"; he was not "forced to shift for himself." *Douglas*, *supra*, 372 U.S. at 358.

The court of appeals held, however, that just as *Anders* prohibits an appellate court from permitting appointed counsel to withdraw from an appeal altogether unless he finds and the court agrees that the appeal *in its entirety* is wholly frivolous (386 U.S. at 744), appointed counsel who remains in the case and argues the appeal must include in his argument every *issue* requested by the appellant unless the lawyer finds that particular issue to be wholly frivolous. Nothing in *Anders* supports such a rule. The portion of the Court's opinion describing the duties of appointed counsel refers only to situations in which the entire "case" or "appeal" is frivolous (*ibid.*); in that event, the appellate court may permit counsel to withdraw, thereby depriving the indigent appellant of the benefit of *all* assistance of counsel acting as his advocate. *Anders* simply does not address the quite different question of how a lawyer who remains in a case that is not wholly frivolous should frame the appeal. The answer to that question, we submit, is to be found not in *Anders* but in the standards that guide an attorney's advocacy generally.

C. An Attorney Has Broad Latitude In Determining Which Issues To Raise, And Omission Of Issues Judged To Be Less Promising May Constitute The Most Effective Advocacy

Most litigation presents a myriad of possible claims, not all of which can be effectively pursued. Of necessity, the attorney therefore must focus his efforts on those claims that appear most likely to prove helpful. The need for the exercise of this professional judgment exists both at trial and on appeal.

1. At trial, counsel might conclude that a particular claim or objection is insubstantial in light of current law or the facts at hand or that it would be unlikely to affect the outcome of the trial even if successfully urged. In

addition, a particular defense or objection, while plausible, might depend upon a characterization of the facts that would be inconsistent with those supporting another defense or claim that, on balance, appears more promising. In other situations, the possibility that the admission of arguably detrimental evidence or other action might invoke the sympathy of the jury could lead the attorney not to raise an objection even if there is some chance it would be sustained. By the same token, counsel might decline to introduce evidence in his possession because it could result in damaging cross-examination or rebuttal evidence. An effective trial attorney also might choose to limit his objections in order to avoid antagonizing the jury or calling its attention to damaging material and to preserve his credibility with the court for the most meritorious claims. Nor can the possibility be ignored that counsel might forego making a particular objection with the intention of raising the claim on appeal or collateral attack if his client is convicted. *Engle* v. *Isaac*, No. 80-1430 (Apr. 5, 1982), slip op. 20 n.34.

2. Similar considerations affect the manner in which appellate counsel frames his case. As an initial matter, appellate courts typically limit the number of pages that may be contained in an appellate brief and the amount of time, if any, permitted for oral argument. See, *e.g.*, Sup. Ct. R. 33.3, 34.3 and 38.3; Fed. R. App. P. 28(g) and 34(b). These external limitations frequently would render it impossible for an attorney fully and persuasively to brief or argue every claim that might be viewed as satisfying some minimum standard of being non-frivolous or "colorable." R. Stern, *Appellate Practice in the United States* 284 (1981).

Quite aside from these external limitations, the circumstances of the case may warrant omission of certain claims on appeal. For example, as at trial, presenting one argument on appeal might require a characterization of the facts that would be inconsistent with the factual foundation on which the attorney would have to premise another

argument that is more likely to succeed.[6] Similarly, the attorney might conclude that a particular claim depends on facts outside the record and therefore would more appropriately be presented on collateral attack. See ABA *Standards for Criminal Justice, Criminal Appeals* 21-3.2 (2d ed. 1980); *id.*, Commentary, at 21-43. A claim of ineffective assistance of trial counsel—one of the two claims the court of appeals found "colorable" in this case (Pet. App. 14a-15a)—is one that ordinarily should first be presented to the trial court for this very reason.[7]

The most important reason for appellate counsel to narrow the number of issues presented for review, however, is simply that the careful selection of the one or few most meritorious issues is widely accepted as an essential attribute of effective advocacy. As one leading commentator on appellate advocacy has written:

> The appellate courts view with disfavor the statement of many questions, in part because they are disinclined to believe that the lower court will have erred

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[6] In the instant case, for example, the Second Circuit faulted Melinger for not raising an ineffective assistance of trial counsel claim based on counsel's failure to make an offer of proof regarding the relevance of evidence purportedly relating to the victim's psychiatric condition. Pet. App. 15a. But an argument that trial counsel failed to lay an adequate foundation for the admission of the evidence would have been inconsistent with another argument Melinger *did* make in his brief: that the trial court erred on the merits in excluding that testimony (J.A. 35-38). As part of that argument, Melinger contended that trial counsel *did* make an offer of proof (*id.* at 36).

[7] See, *e.g.*, *United States* v. *Lurz*, 666 F.2d 69, 78 (4th Cir. 1981); *United States* v. *Aulet*, 618 F.2d 182, 185-186 (2d Cir. 1980); *United States* v. *Schreiber*, 599 F.2d 534, 538 (3d Cir.), cert. denied, 444 U.S. 843 (1979). Melinger may have been making this point when he advised respondent in his November 9, 1977 letter that the arguments in respondents' first pro se brief—which included a generalized assertion of ineffective assistance of trial counsel because of an alleged failure to investigate (J.A. 19-21)—were not "supportable by the record" (*id.* at 28) and that new facts pertaining to such claims could not be raised on appeal (*id.* at 27).

> on practically everything, even though that occasionally may happen. Most cases present only one, two, or three significant questions. * * * Usually, * * * if you cannot win on a few major points, the others are not likely to help, and to attempt to deal with a great many in the limited number of pages allowed for [in] briefs will mean that none may receive adequate attention. The effect of adding weak arguments will be to dilute the force of the stronger ones.

R. Stern, *supra*, at 266. See also *id.* at 284-285. Justice Jackson made the same point as regards advocacy before this Court:

> One of the first tests of a discriminating advocate is to select the question, or questions, that he will present orally. Legal contentions, like the currency, depreciate through over-issue. The mind of an appellate judge is habitually receptive to the suggestion that a lower court committed an error. But receptiveness declines as the number of assigned error increases. Multiplicity hints at lack of confidence in any one. Of course, I have not forgotten the reluctance with which a lawyer abandons even the weakest point lest it prove alluring to the same kind of judge. But experience on the bench convinces me that multiplying assignments of error will dilute and weaken a good case and will not save a bad one.

Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, in *Advocacy and the King's English* 193 (G. Rossman ed. 1960).[8]

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[8] See also Godbold, *Twenty Pages and Twenty Minutes—Effective Advocacy on Appeal*, 30 Sw. L.J. 801, 808-809 (1976); F. Wiener, *Briefing And Arguing Federal Appeals* 96 (1975); Tate, *Federal Appellate Advocacy in the 1980's*, 5 Am. J. Trial Advoc. 63, 67-68 (1981); L. Hand, *In Memory of Charles Neave*, in *The Spirit of Liberty* 127-128 (Dilliard's 2d ed. 1951). See also *United States* v. *Computer Sciences Corp.*, No. 81-5053 (4th Cir. June 16, 1982), slip op. 3; *Cole* v. *Stevenson*, 620 F.2d 1055, 1071 n.25 (4th Cir. 1980); *Ennis* v. *LeFevre*, 560 F.2d 1072, 1077-1078 (2d Cir. 1977) (Newman, J., concurring), cert. denied, 435 U.S. 976 (1978); *People* v. *Eckstrom*, 43 Cal. App. 3d 996, 1002-1003, 118 Cal. Rptr. 391,

3. In view of the various considerations that may lead an attorney to decline to raise a particular objection or make a particular argument, it is not surprising that this Court only recently reaffirmed that the Constitution "does not insure that defense counsel will * * * raise every conceivable constitutional claim" at trial. *Engle* v. *Isaac*, *supra*, slip op. 25. Similarly, the performance of appellate counsel cannot be regarded as constitutionally flawed merely because he has not made every argument that might appear to an outside observer to be at least "colorable" or not wholly frivolous. See *Gustave* v. *United States*, 627 F.2d 901, 906 (9th Cir. 1980); *Cerbo* v. *Fauver*, 616 F.2d 714, 718 (3d Cir. 1980); *Ennis* v. *LeFevre*, 560 F.2d 1072, 1075 (2d Cir. 1977), cert. denied, 435 U.S. 976 (1978); *Gillihan* v. *Rodriguez*, 551 F.2d 1182, 1189 (10th Cir. 1977); *Harshaw* v. *United States*, 542 F.2d 455, 457 (8th Cir. 1976); but cf. *Polk County* v. *Dodson*, *supra*, slip op. 11.

Because the latitude for the exercise of an attorney's professional judgment regarding how to present a case applies equally to retained and appointed counsel (*Polk County* v. *Dodson*, *supra*, slip op. 5, quoting ABA *Standards for Criminal Justice, The Defense Function* 4-3.9 (2d ed. 1980); cf. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 344-345), there is no discrimination against indigent appellants under *Douglas* and *Anders* when court-appointed appellate counsel is afforded that latitude. Indeed, because effective appellate advocacy ordinarily requires the attorney to concentrate his efforts on a limited number of arguments, pursuing that course substantially *furthers* the objective of *Anders* of ensuring that counsel will "support his client's appeal to the best of his ability" (386 U.S. at 744). Conversely,

> [i]f appointed counsel were obligated in every case to make arguments that amount to little more than

395 (1974) ("[The effective lawyer] is as miserly with motions, objections and issues as an Ernest Hemingway with words or a Louis Armstrong with musical notes. He has an instinct for the jugular, an ability to explore the meritorious and to ignore the trivial").

> meaningless charades, a subtle and invidious distinction between appointed and retained counsel might develop. The indigent, unlike the nonindigent defendant, would lose the benefit of retained counsel's implicit representation to the court that he believes in the legal substantiality of the contentions advanced.

Nickols v. *Gagnon*, 454 F.2d 467, 472 (7th Cir. 1971) (Stevens, J.), cert. denied, 408 U.S. 925 (1972) (footnote omitted). Accordingly, *Anders* does not "requir[e] appointed counsel to make arguments that he would not consider worthy of inclusion in a brief submitted on behalf of a paying client" (454 F.2d at 471).

D. With The Exception Of Certain Fundamental Decisions—Such As Whether The Defendant Will Plead Guilty, Waive Jury Trial, Testify, Or Take An Appeal —The Constitution Permits Decisions Regarding The Conduct Of The Proceeding To Rest Ultimately With The Attorney

1. The accused in a criminal prosecution has a Sixth Amendment right to dispense with the assistance of counsel and to represent himself at trial. But "when a defendant chooses to have a lawyer manage and present his case, law and tradition may allocate to the counsel the power to make binding decisions of trial strategy in many areas." *Faretta* v. *California*, *supra*, 422 U.S. at 820.[9] "Once counsel is appointed, the day-to-day conduct of the defense rests with the attorney. He, not the client, has the immediate—and ultimate—responsibility of deciding if and when to object, which witnesses, if any, to call, and what defenses to develop." *Wainwright* v. *Sykes*, 433 U.S. 72, 93 (1977) (Burger, C.J., concurring).[10] Thus, "a

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[9] See *Wainwright* v. *Sykes*, 433 U.S. 72, 91 n.14 (1977); *Estelle* v. *Williams*, 425 U.S. 501, 512 (1976); *id.* at 515 n.4 (Powell, J., concurring); *Brookhart* v. *Janis*, 384 U.S. 1, 7-8 (1966); *Henry* v. *Mississippi*, 379 U.S. 443, 451 (1965); *Fay* v. *Noia*, 372 U.S. 391, 439 (1963); cf. *Engle* v. *Isaac*, *supra*, slip op. 21-25.

[10] Accordingly, the courts of appeals have consistently held that there is no constitutional right to hybrid representation, under

lawyer may properly make a tactical determination of how to run a trial even in the face of his client's incomprehension or even explicit disapproval." *Brookhart* v. *Janis*, 384 U.S. 1, 8 (1966) (Harlan, J., concurring); *Wiley* v. *Sowders*, 647 F.2d 642, 648 (6th Cir.), cert. denied, 454 U.S. 1091 (1981). As the standards of the legal profession make clear, "[o]nly such basic decisions as whether to plead guilty, waive a jury, or testify in one's own behalf are ultimately for the accused to make." *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 n.1 (Burger, C.J., concurring). See ABA *Standards for Criminal Justice, The Defense Function* 4-5.2 (2d ed. 1980); ABA Commission on Evaluation of Professional Standards, *Model Rules of Professional Conduct* 1.2(a) (Proposed Final Draft May 30, 1981); *id.* at 17 (Notes to Rule 1.2(a), and cases cited); but cf. *Wright* v. *Estelle*, 572 F.2d 1071 (5th Cir. 1978) (en banc), cert. denied, 439 U.S. 1004 (1978).

Thus, although the client's decision regarding the ultimate objective of the representation is controlling, the means by which that objective is to be pursued may properly be for the attorney to decide. ABA *Model Rules* 1.2(a), *supra*.[11] This division of authority rests on the na-

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which the defendant and counsel share responsibility for these matters. See, *e.g.*, *United States* v. *Clarkson*, 681 F.2d 817 (4th Cir. 1982) (unpublished opinion, No. 78-5213, slip op. 7); *United States* v. *Halbert*, 640 F.2d 1000, 1009 (9th Cir. 1981).

[11] Proposed Rule 1.2(a) provides (emphasis added):

> A lawyer shall abide by a client's decisions concerning the objectives of representation, subject to paragraphs (c), (d) and (e), *and shall consult with the client as to the means by which they are to be pursued.* A lawyer shall abide by a client's decision whether to accept an offer of settlement of a matter. In a criminal case, the lawyer for the defendant shall abide by the client's decision, after consultation with the lawyer, as to a plea to be entered, whether to waive jury trial and whether the client will testify.

The emphasized passage, when compared with the remainder of the Rule, makes clear that the lawyer should consult with the defendant, but need not necessarily abide by the defendant's decision, regarding the means by which the client's objectives are to be pursued.

ture of the respective roles of attorney and client. "The defendant, and not his lawyer * * *, will bear the personal consequences of a conviction" (*Faretta*, *supra*, 422 U.S. at 834), and only he therefore is in a position to determine whether to defend against the charges or acknowledge his culpability and accept the consequences by pleading guilty. Although the merits of the prosecution's case obviously will have a substantial bearing on the client's decision whether to plead guilty, and accordingly he requires the advice of counsel (*McMann* v. *Richardson*, 397 U.S. 759 (1970)), his determination ultimately is not a legal one of the kind that appropriately may be allocated to the attorney. *Brookhart* v. *Janis*, *supra*. Conversely, such matters as which witnesses to call, whether and how to cross-examine adverse witnesses, and what motions and legal arguments to make all require the skill, training and experience of the attorney,[12] and for this reason "the lawyer is the master of procedural and tactical aspects of litigation." ABA *Model Rules*, *supra*, at 17.

2. Similar considerations govern the division of responsibilities between lawyer and client on appeal. Following a judgment of conviction, the client may reassess the circumstances and choose to acknowledge his guilt or at least accept the consequences of his conviction. The decision whether to take an appeal, while undoubtedly influenced by the likelihood of success on the merits of the legal arguments his attorney would raise, therefore is not at bottom a legal decision. As a result, the fundamental decision whether to file an appeal and thereby initiate another round of judicial proceedings, like the decision whether to plead guilty in the trial court, is for the client to make. ABA *Code of Professional Responsibility* EC 7-7 (1978). But if the client chooses to proceed with an appeal, then at that stage, no less than at trial, "the lawyer

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[12] *Powell* v. *Alabama*, 287 U.S. 45, 69 (1932); *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 93 (Burger, C.J., concurring); ABA *Standard for Criminal Justice, The Defense Function*, *supra*, 4-5.2, Commentary at 4.68.

is the master of procedural and tactical aspects of litigation. ABA *Model Rules*, *supra*, at 17. Although as a matter of professional duty the lawyer should consult with his client on these points where possible,[13] the ultimate determination of what legal arguments to present on appeal—the means by which the client's objective of securing a reversal of his conviction is to be pursued—is for appellate counsel to decide. See *Johnson* v. *United States*, 360 F.2d 844, 846 (D.C. Cir. 1966) (Burger, J, concurring).[14] The court of appeals' holding in this case that court-appointed appellate counsel

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[13] However, a failure to consult with the appellant on these matters does not itself constitute reversible error. *United States* v. *Ward*, 610 F.2d 294, 295 (5th Cir. 1980); *Hooks* v. *Roberts*, 480 F.2d 1196, 1196-1197 (5th Cir. 1973), cert. denied, 414 U.S. 1163 (1974).

[14] The court of appeals erred in relying (Pet. App. 17a) on EC 7-7 of the ABA *Code of Professional Responsibility*, *supra*, for the proposition that the client has the ultimate authority to determine what arguments should be made on appeal. EC 7-7 provides only that the client must determine whether to plead guilty or to take an appeal; it does not address the question of the division of authority between the attorney and client in choosing the means by which the client's objective of securing an acquittal at trial or a reversal on appeal should be pursued if the client elects those courses. See ABA *Model Rules*, *supra*, Notes to Rule 1.2(a), at 16 (noting that the ABA *Code of Professional Responsibility* did not address the matter of decisionmaking responsibility). The court of appeals also quoted EC 7-8 for the proposition that "the decision whether to forego legally available objectives or methods because of non-legal factors is ultimately for the client" (Pet. App. 17a). EC 7-8, too, is irrelevant here, for it addresses only the client's choice of objectives, not the lawyer's selection of means to attain them.

The ABA *Standards for Criminal Justice* do appear to suggest that the client must be permitted to decide not only whether an appeal will be taken but also how the appeal should be framed. *Criminal Appeals* 21-3.2(b)(ii), and Commentary at 21.42. However, this suggestion is based entirely on EC 7-7 of the ABA *Code of Professional Responsibility*, which, as explained above, does not address the latter issue. This suggestion regarding counsel's responsibility on appeal also is inconsistent with the *Standards*' explicit recognition elsewhere that, at trial, counsel has the ultimate authority to decide what claims to raise. See page 17, *supra*.

must advance all arguments requested by the appellant unless they are entirely frivolous therefore constitutes an unprecedented departure from the accepted principles regarding the role of counsel in criminal cases, both at trial and on appeal.[15]

3. a. These principles regarding the allocation of decisionmaking responsibility between attorney and client in criminal cases do not violate an indigent appellant's constitutional rights, whatever may be the appropriate constitutional framework within which to assess counsel's performance. As we previously have noted (see pages 7-8, *supra*), this Court has not relied upon the Sixth Amendment in holding that a State must furnish counsel to an indigent appellant. But even if we assume that the Sixth Amendment is applicable, that Amendment clearly would not require that the appellant be permitted to override his attorney's judgment on matters of strategy. This much is evident from the discussion above of *Faretta* and of the standards governing counsel's performance at trial.

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[15] The only federal appellate decision the Second Circuit cited in support of its holding (Pet. App. 10a-11a) is *High* v. *Rhay*, 519 F.2d 109, 112-113 (9th Cir. 1975). Contrary to the court of appeals' apparent belief, however, the Ninth Circuit did not even consider in that case an attorney's obligation to argue non-frivolous points requested by his client. The court did note in passing that counsel had listed in his brief several arguments suggested by the appellant but did not include those arguments in his own assignment of error in the brief. 519 F.2d at 111-112. The court's holding, however, was concerned only with counsel's treatment of the single issue he *did* include in the assignment of error, which the court appeared to believe was the *only* issue that counsel viewed as non-frivolous. The court found counsel's perfunctory mention of this issue facially inadequate to satisfy the duty of conscientious advocacy under *Anders*. 519 F.2d at 112. Melinger's brief in this case did not suffer from that defect. *High* v. *Rhay* therefore has no bearing on this case. *People* v. *Gonzalez*, 47 N.Y.2d 606, 393 N.E.2d 987, 419 N.Y.S.2d 913 (1979), cited by the court below (Pet. App. 12a), also involved a brief that was facially inadequate to satisfy the requirements of *Anders*. The question of an attorney's obligation to argue all non-frivolous points urged by the appellant was not involved.

In our view, this conclusion is but a specific application of the more general proposition that the "Assistance of Counsel" of which the Sixth Amendment speaks is representation by an attorney who adheres to reasonable laws and regulations governing the practice of law (see, *e.g.*, 28 U.S.C. 1654) and whose conduct is guided by the accepted ethical standards of the legal profession. Thus, we have argued in other settings that a defendant does not have a Sixth Amendment right to be represented at trial by an attorney who has a conflict of interest that would violate applicable ethical standards and might render counsel's assistance constitutionally ineffective.[16] So here, the Sixth Amendment does not support the Second Circuit's holding that, in substance, an indigent appellant has a constitutional right to ineffective assistance of counsel in the sense that he must be permitted to overrule his attorney's considered professional judgment about the best way in which to present the appeal.

b. Nor is the Second Circuit's per se rule supported by the principles of fundamental fairness derived from the Due Process Clause. Because that Clause does not even require a State to furnish a right of appeal in the first instance, the Court should not lightly conclude that particular procedures nevertheless are essential elements of whatever appellate process the State does elect to make available—as long as the process itself is free of unreasoned distinctions and does not operate in a punitive fashion. *North Carolina* v. *Pearce*, 395 U.S. 711, 723-725 (1969).

Accordingly, we do not believe that a state court can be said to act toward the indigent appellant in a manner that is fundamentally unfair when it affirms his conviction on the basis of an appeal presented by a lawyer who has exercised his professional judgment regarding the most effective way in which to advance his client's cause, even though the client might disagree with the lawyer's

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[16] See, *e.g.*, Brief for the United States as Amicus Curiae in *Morris* v. *Slappy*, No. 81-1095, at 19-23.

judgment. It is after all the lawyer, not the client, who is acknowledged to be the expert in such matters, and it is the perceived need for this expertise that has led the Court to hold that counsel must be appointed to represent indigent persons at trial and on appeal. *Gideon* v. *Wainwright*, *supra*, 372 U.S. at 335; *Douglas* v. *California*, *supra*, 372 U.S. at 357-358. Indeed, the very purpose of the appeal is to identify legal errors (*Schwab* v. *Berggren*, 143 U.S. 442, 449 (1892)), and the appeal, unlike the trial, may be conducted without the personal presence of the appellant (*Price* v. *Johnston*, 334 U.S. 266, 285-286 (1948)).[17]

c. Finally, the equal protection principles invoked in *Griffin*, *Douglas*, and *Anders* likewise do not support a holding that a State must ensure that an indigent appellant may overrule his attorney's legal and tactical judgments. The duties of a lawyer to his client in a criminal case are the same whether the lawyer is retained by the client or appointed by the court. *Polk County* v. *Dodson*, *supra*, slip op. 5. The tradition that the lawyer has the ultimate decisionmaking authority on tactical and legal matters at all stages of the case also applies equally to all lawyers. For this reason, a state court cannot be thought to have deprived an indigent appellant of the equal protection of the laws when it affirms his conviction on the basis of an appeal presented by appointed counsel who has exercised the same authority that is possessed by retained counsel to decline to make a par-

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[17] While it is true that the opportunity for consultation with the client may often be less at trial than on appeal, the allocation of decisionmaking responsibilities at trial does not depend upon the fact that there may not be an opportunity for full consultation with the accused on all matters of trial strategy. In many situations, trial options may readily be foreseen and discussed with the client. The allocation, rather, stems from a recognition of the lawyer's training and judgment in such matters. The appellate stage therefore cannot for present purposes be distinguished from trial on the basis of the possibility for greater consultation.

ticular argument notwithstanding his client's contrary wishes.

Perhaps the court of appeals' decision rests on the unstated assumption that a non-indigent appellant, if dissatisfied with his retained counsel's performance, could fire that attorney and hire another who would argue the appeal in the manner the appellant preferred. The ability of most non-indigents to pursue that course, even if they desired to do so, may be doubted. There surely would be financial and temporal constraints involved in replacing a lawyer who already has devoted considerable attention to the case with another attorney who knows nothing about it. In any event, mere speculation that, in an individual case, a non-indigent appellant might be able to prevail upon his retained counsel to make certain arguments does not mean that the state court has deprived indigents as a class of meaningful access to the appellate process if a court-appointed attorney declines to do so in a particular case. *Ross, supra*, 417 U.S. at 609. "The duty of the State under [this Court's] cases is not to duplicate the legal arsenal that may be privately retained by a criminal defendant in a continuing effort to reverse his conviction, but only to assure the indigent defendant an adequate opportunity to present his claims fairly in the context of the State's appellate process." *Id.* at 616.

It can no doubt be said in retrospect that this particular appellant would have been no worse off had his attorney followed his wishes rather than the attorney's professional judgment. But for the reasons set forth above, it cannot be doubted that the prospective consequence of the rule established by the court of appeals would be a significant deterioration in the quality of indigent criminal appellants' legal representation. We cannot believe that the Constitution demands that indigents be afforded this particular avenue for self-destruction.

E. Relief Based Upon Appellate Counsel's Performance If Available At All, Requires A Showing Of Actual Ineffectiveness

For the foregoing reasons, the Court should reject the court of appeals' per se rule requiring appellate counsel to make all non-frivolous arguments requested by an indigent appellant. The adequacy of counsel's brief is more appropriately considered under whatever standards of effective representation, if any, the Constitution imposes on appellate counsel. The majority of the court of appeals did not reach that question. We offer only a few observations in the event that this Court nevertheless deems it appropriate to intimate some views on the subject.

Because this Court has relied upon due process and equal protection principles, rather than the Sixth Amendment, in requiring that counsel be appointed to represent an indigent appellant, there is some question whether the standards developed under the Sixth Amendment for evaluating the adequacy of counsel's performance at trial are applicable at all to cases involving appellate counsel. Indeed, in view of the limitations inhering in the due process and equal protection analysis of *Griffin* and *Douglas* (see pages 4-6, *supra*), a substantial argument can be made that a court entertaining a collateral attack on appellate counsel's performance should scrutinize the handling of the appeal only to satisfy itself that the court hearing the appeal reasonably believed that the attorney it selected to represent the indigent appellant was competent to handle the case (*Polk County* v. *Dodson*, *supra*, slip op. 1 (Burger, C. J., concurring); cf. *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 343, 347) and that counsel in fact acted as an advocate on behalf of his client (*Anders*, *supra*) and exercised his professional judgment about how the appeal as a whole should be framed (cf. *Youngberg* v. *Romeo*, No. 80-1429 (June 18, 1982), slip op. 14-16).[18]

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[18] This would not require counsel, in order for his representation to be found constitutionally adequate, to identify and actually

Even if Sixth Amendment standards were applied by analogy in the appellate setting, however, it is clear that the burden of establishing constitutionally ineffective assistance would be a heavy one. In order to prove a Sixth Amendment violation, the defendant must show more than that his trial counsel erred or even that counsel's performance was below average when compared to the assistance rendered in criminal cases generally. Rather, he must show that the attorney's performance was outside the *range* of competence that reasonably may be expected of counsel in criminal cases. *McMann* v. *Richardson*, *supra*, 397 U.S. at 771; *Tollett* v. *Henderson*, 411 U.S. 258, 266 (1973); *Wainwright* v. *Sykes*, *supra*, 433 U.S. at 96 (Stevens, J., concurring); see also *Engle* v. *Isaac*, *supra*, slip op. 25; *Cuyler* v. *Sullivan*, *supra*, 446 U.S. at 349. Put another way, the defendant must show "serious derelictions" on the part of trial counsel. *McMann* v. *Richardson*, *supra*, 397 U.S. at 774.[19]

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exercise his professional judgment about whether every individual issue potentially present in the case should be pressed. *Engle* v. *Isaac*, *supra*, slip op. 25.

[19] The courts of appeals too have stressed that counsel's performance must have departed substantially from the norm. See, *e.g.*, *Cooper* v. *Fitzharris*, 586 F.2d 1325, 1330 (9th Cir. 1978) (en banc), cert. denied, 440 U.S. 974 (1979) ("serious derelictions"); *Long* v. *Brewer*, 667 F.2d 742, 745 (8th Cir. 1982) ("serious incompetency"); *Boyd* v. *Estelle*, 661 F.2d 388, 389 (5th Cir. 1981) ("seriously inadequate"); *Taylor* v. *Starnes*, 650 F.2d 38, 41 (4th Cir. 1981) ("flagrant" error); *Marzullo* v. *Maryland*, 561 F.2d 540, 544 (4th Cir. 1977), cert. denied, 435 U.S. 1011 (1978) (same); *United States* v. *Decoster*, 624 F.2d 196, 208 (D.C. Cir.) (plurality opinion), cert. denied, 444 U.S. 944 (1979); ("serious incompetency"); 624 F.2d at 232 (MacKinnon, J., concurring) ("substantial breach" of duty); *id.* at 246 (Robinson, J., concurring) (same); *id.* at 275 (Bazelon, J., dissenting) (same); *United States* v. *Wood*, 628 F.2d 554, 559 (D.C. Cir. 1980) (en banc) (same).

For this reason, we do not attach too much significance to the Second Circuit's continued adherence to the "farce and mockery" rubric. See, *e.g.*, *United States* v. *Helgesen*, 669 F.2d 69 (2d Cir. 1982); *United States* v. *Wight*, 176 F.2d 376 (2d Cir. 1949), cert.

In addition, this Court's decision in *Chambers* v. *Maroney*, 399 U.S. 42, 53-54 (1970), makes clear that in order for a conviction to be set aside under the Sixth Amendment because of the asserted inadequacy of trial counsel's representation, there must be some showing of prejudice. See also *United States* v. *Morrison*, 449 U.S. 361 (1981). The weight of court of appeals authority is decidedly to the same effect (see generally *Washington* v. *Strickland*, 673 F.2d 879, 895-902 (5th Cir. 1982), and cases cited in Brief for the United States as Amicus Curiae in *Morris* v. *Slappy*, No. 81-1095, at 10-11 n.2), although there is some divergence concerning the *degree* of prejudice that must be shown and whether a showing of prejudice is an element of establishing a Sixth Amendment violation or simply a requirement for obtaining relief. See *United States* v. *Green*, 680 F.2d 183, 189-190 (D.C. Cir. 1982); *United States* v. *Baynes*, No. 81-1620 (3d Cir. Aug. 11, 1982), slip op. 19-21; *Washington* v. *Strickland*, *supra*, 673 F.2d at 902. Cf. *United States* v. *Morrison*, *supra*, 449 U.S. at 364.[20] In any event, it

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denied, 338 U.S. 950 (1950). The phrase "farce and mockery" largely serves to emphasize that there must be a substantial departure from the range of competence ordinarily expected of defense counsel, and its application in lieu of the differently worded standard of the other circuits therefore probably affects the outcome in few, if any, cases. The Ninth and Tenth Circuits acknowledged this point when they abandoned the "farce and mockery" language (*Dyer* v. *Crisp*, 613 F.2d 275, 278 (10th Cir.) (en banc), cert. denied, 445 U.S. 945 (1980); *Cooper* v. *Fitzharris*, *supra*, 586 F.2d at 1329), and Judge Leventhal similarly observed in *United States* v. *Decoster*, *supra*, 624 F.2d at 206, that the differing formulations may be little more than a " 'semantic merry-go-round.' "

[20] In *Rodriguez* v. *United States*, 395 U.S. 327 (1969), *Robinson* v. *Wyrick*, 635 F.2d 757, 758 (8th Cir. 1981), and *Horsley* v. *Simpson*, 400 F.2d 708 (5th Cir. 1968), relied upon by the court of appeals (Pet. App. 13a) for the proposition that prejudice need not be shown, counsel's neglect entirely deprived the client of the ability to take an appeal. Those cases did not involve the exercise of counsel's judgment in deciding which issues should be presented

would be premature to consider the nature of the appellant's burden on the issue of prejudice in this case. The majority below did not even consider the threshold issue that must be resolved before it is necessary to consider the element of prejudice—*i.e.*, whether appellate counsel's performance departed substantially from the range of competence ordinarily exhibited by counsel in criminal cases—and Judge Meskill and the district judge, who *did* address this issue, found counsel's performance to have been constitutionally adequate.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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SEPTEMBER 1982

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in an appeal that was properly taken. *High* v. *Rhay*, also cited by the court below (Pet. App. 13), involved a violation of *Anders*, because counsel failed even to act as an advocate for the appellant. See note 15, *supra*. The indigent appellant concededly is entitled to a new appeal if the requirements of *Anders* are not met.

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Docket Sheet

NO. 81-1794-CFH	TITLE Everett W. JONES, Superintendent, Great Meadow Correctional Facility, et al., Petitioners v. David BARNES

DOCKETED	COURT
March 25, 1982	U.S. Court of Appeals for the Second Circuit

DATE	PROCEEDINGS AND ORDERS
	Counsel for Petitioners: Barbara D. Underwood
	Counsel for Respondent:
Mar. 25, 1982	Petition for writ of certiorari filed. (Record filed).
Apr. 23, 1982	Order extending time to file a response to the petition until May 17, 1982.
May 18, 1982	DISTRIBUTED. 6-3.
May 20, 1982	Motion of respondent for leave to proceed in forma pauperis and brief in opposition filed.
June 1, 1982	Reply brief for the petitioner filed. (D).
June 1, 1982	DISTRIBUTED. 6-3. (Motion of respondent for leave to proceed in forma pauperis).
June 7, 1982	The motion of respondent for leave to proceed in forma pauperis is GRANTED. Petition GRANTED.

July 8, 1982	Order extending time to file the joint appendix and petitioners' brief on the merits until Aug. 21, 1982.
Aug. 18, 1982	Order further extending time to file the joint appendix and the petitioner's brief on the merits until August 28, 1982.
Aug. 30, 1982	Joint appendix filed.
Aug. 30, 1982	Brief for the petitioner filed.
Sept. 8, 1982	Brief, amicus curiae, of the U. S. filed.
Sept. 13, 1982	Order extending time to file the respondent's brief on the merits until Oct. 27, 1982.
Oct. 7, 1982	Order further extending time to file the respondent's brief on the merits until Nov. 10, 1982.
Nov. 10, 1982	Brief for the respondent filed.
Nov. 12, 1982	Brief, amicus curiae, of The National Legal Aid and Defender Association filed.
Dec. 14, 1982	CIRCULATED.
Feb. 15, 1983	Reply brief for the petitioners filed. (D).
Feb. 22, 1983	ARGUED.